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Identical letters dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council

The Governments of Switzerland, Germany and Sweden have commissioned the Targeted Sanction Project of the Watson Institute for International Studies of Brown University, Providence, Rhode Island, to analyse current sanctions committee practices and recommend proposals to strengthen United Nations targeted sanctions procedures.

As a result of its analysis, the Watson Institute produced a white paper entitled "Strengthening targeted sanctions through fair and clear procedures" in March 2006 (see annex). We would like to make this document available to the General Assembly, as a contribution to the current deliberations on the follow-up to the outcome of the 2005 World Summit, and with the Security Council with a view to supporting the latter's ongoing efforts to strengthen the instrument of targeted sanctions.

The Watson Institute is responsible for the contents of the white paper. The views, recommendations and conclusions included in the white paper do not necessarily reflect the positions of the three Governments that commissioned the paper.

We would be grateful if you would arrange to have the text of the present letter and its annex distributed as a document of the General Assembly, under agenda item 120, and of the Security Council.

(*Signed*) Gunter **Pleuger**
Ambassador
Permanent Representative of Germany to the United Nations

(*Signed*) Anders **Lidén**
Ambassador
Permanent Representative of Sweden to the United Nations

(*Signed*) Peter **Maurer**
Ambassador
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Annex to the letter dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council

Strengthening Targeted Sanctions Through Fair and Clear Procedures

White Paper prepared by the Watson Institute Targeted Sanctions Project Brown University

30 March 2006

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Larissa van den Herik and Nico Schrijver of Leiden University wrote the legal analysis contained in Section Two. We are grateful for their contribution and assistance in crafting the options for a review mechanism in Section Four. Jonathan Liu, Pieter Biersteker, and Kate Roll assisted in the research for this paper. Watson Institute research assistant Kate Roll deserves special recognition for her tireless efforts, and especially for developing the tables in Section Three which summarize the current practices of UN Security Council committees targeting sanctions. Our colleague Peter Romaniuk provided insightful comments and prepared the figures in the Appendix.

The Targeted Sanction Project of the Watson Institute for International Studies at Brown University in Providence, Rhode Island is responsible for this white paper. Experts discussed an earlier version at a meeting in January 2006. All participants at that meeting spoke in their individual and not institutional capacity. The authors wish to thank the participants for their comments, as well as the more than three dozen representatives of Missions to the United Nations, Secretariat officials, subsidiary group members, and others, who were interviewed during the researching and writing of this paper. We are grateful for their time and input. In particular, we appreciate the many thoughtful and detailed comments we received on the draft paper. Any errors and omissions are the responsibility of the authors. Continued feedback on this paper and related issues is most welcome.

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EXECUTIVE SUMMARY

Since the early 1990s, the United Nations (UN) has increasingly targeted sanctions to improve their effectiveness and reduce humanitarian costs. While targeted sanctions significantly improve upon comprehensive sanctions in reducing humanitarian impact, the move from sanctions against states to sanctions targeted against individuals and non-state entities has generated new issues, particularly regarding the rights and standing of parties that might be listed wrongly. While political and administrative in nature, targeted sanctions can affect peoples' lives in a manner comparable to criminal proceedings.

Legal Challenges. Recent legal challenges before various courts have raised important questions regarding targeted sanctions imposed under Chapter VII of the UN Charter. While no national or regional court has invalidated measures giving effect to a listing by a UN sanctions committee, these legal actions potentially pose significant challenges to the efficacy of targeted sanctions. This is of particular concern, given the increasing importance of targeted sanctions in the international community's effort to counter global terrorism and to maintain international peace and security.

Resolutions of the United Nations Security Council (Security Council) have been largely preserved from judicial review. In recent European cases, however, courts have begun to review the implementation of targeted sanctions with regard to conformity with norms of *jus cogens* (a body of higher rules of international law from which no derogation is possible). In the future, courts may review the sanctions in light of the requirements of the right to an effective remedy.

The right to an effective remedy lies at the heart of the debate on targeted sanctions and human rights. Elements that render a remedy effective are: (i) an independent and impartial authority, (ii) decision-making authority, and (iii) accessibility. Improvements in the procedures to apply sanctions, ensuring that they are fair and clear in their application, could reduce the risk of judicial decisions that could complicate efforts to promote international peace and security.

Sanction Committee Practices. Important improvements have been made over time by UN sanctions committees, especially the UN Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and Taliban and Associated Individuals and Entities (1267 Committee). Criticisms persist about procedures related to the designation or listing of individuals, operations of committees, and the process for individuals and entities to be removed from the list. Problems with the failure to notify listed individuals and entities, as well as the lack of information regarding the basis for listing, contribute to perceptions of unfairness. Without periodic review of those listed, as well as limited time frames to resolve pending issues such as delisting requests, the open-ended nature of sanctions raises important concerns about procedural fairness. Moreover, in most instances current procedures permit only the country of the targeted party's residence or citizenship to request delisting, leading to potential problems of procedural fairness for listed parties in states that oppose or refuse to forward delisting requests. Finally, the lack of

transparency of committee procedures and difficulties in obtaining information contribute to general perceptions of unfairness.

Recommendations. To address shortcomings of existing UN Security Council sanctions committee procedures, we recommend the following proposals:

Listing

1. Criteria for listing should be detailed, but non-exhaustive, in Security Council resolutions.

2. Establish norms and general standards for statements of case.

3. Extend time for review of listing proposals from two or three to five to ten working days for all sanctions committees.

4. To the extent possible, targets should be (a) notified by a UN body of their listing, the measures being imposed, and information about procedures for exemptions and delisting, and (b) provided with a redacted statement of case indicating the basis for listing.

Procedural issues

1. Designate an administrative focal point within the Secretariat to handle all delisting and exemption requests, as well as to notify targets of listing.

2. Establish a biennial review of listings.

3. Enhance the effectiveness of sanctions committees by establishing time limits for responding to listing, delisting, and exemption requests, as well as by promulgating clear standards and criteria for delisting.

4. Increase the transparency of committee practices through improved websites, more frequent press statements, and a broader dissemination of committee procedures.

Options for a Review Mechanism

Beyond procedural improvements, there is a need for some form of review mechanism to which individuals and entities may appeal decisions regarding their listing. Options to be considered include:

1. A review mechanism under the authority of the Security Council for consideration of delisting proposals.

a) Monitoring Team–expand the existing group's mandate.
b) Ombudsman–appoint an eminent person to serve as interface with UN.
c) Panel of Experts–create panel to hear requests.

2. An independent arbitral panel to consider delisting proposals.

3. Judicial review of delisting decisions.

SECTION ONE

Introduction

> ***"We also call upon the Security Council …to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions."***
>
> UN General Assembly, World Summit Outcome document, September 2005[1]

Sanctions are an essential instrument of United Nations efforts to maintain international peace and security. Since the experience of comprehensive sanctions against Iraq in the early 1990s, the United Nations has increasingly used targeted sanctions[2] to improve the effectiveness of sanctions and to reduce the negative humanitarian consequences of sanctions on innocent civilian populations. While targeted sanctions significantly improve upon comprehensive sanctions by reducing the humanitarian impact, the move from sanctions against states to sanctions targeted against individuals and non-state entities has generated new issues, particularly regarding the rights and standing of parties that might be listed wrongly.

Targeted sanctions are typically applied either as incentives to change behavior or as preventive measures, as in the case of sanctions against individuals or entities that facilitate terrorist acts. Sanctions to stem the financing of terrorism or to deny safe haven or travel by terrorists have become valuable tools in the global effort to counter terrorism. The importance of targeted sanctions in maintaining international peace and security has increased with time, with significant efforts to strengthen the instrument. The Interlaken, Bonn-Berlin, and Stockholm processes—sponsored respectively by the governments of Switzerland, Germany, and Sweden—were undertaken to further the effectiveness and credibility of targeted sanctions.[3]

If they are implemented effectively,[4] targeted sanctions cause economic disruption and financial hardship on the targeted parties. These consequences are mitigated to some degree by exemptions to cover basic needs, as appropriate, which are administered by relevant sanctions committees. However, the stigmatizing and psychological impact of being wrongly listed may have more significant and far-reaching effects than economic or financial hardships. From the standpoint of individuals engaged in business operations, a damaged reputation may be the most significant and longest lasting consequence of being targeted. Although they are focused on individuals or entities, targeted sanctions can also have significant collateral effects on the families of targeted individuals, on the employees of targeted entities, or on the users of their services, as in the case of sanctions against al Barakaat in 2002.[5] In some instances, there also have been problems associated with prompt notification, absence of justification for listing, or information about how to appeal a designation.

UN Security Council sanctions committees have introduced measures to ameliorate these effects, from standardizing humanitarian exemptions to developing delisting procedures of varying forms and terms (see Table III in Section Three). Nowhere is this more apparent than in the instance of the 1267 Committee, which formed a monitoring team to assist the committee, routinized exemptions, and developed delisting procedures (see Chart I in Section Three). Nonetheless, there is a broadly based perception that current procedures are not adequately "fair and clear," which we define in the most general terms to include both procedural fairness (impartial application of measures, proportionality, the right to adequate notification, and the opportunity to be heard) and an effective remedy for wrongly listed parties.

Five recent cases before the European Court of Justice, along with legal challenges in national courts in Europe, North America, and elsewhere (including two lawsuits in Turkey and one in Pakistan), have raised important questions about Security Council measures passed under Chapter VII of the UN Charter that target individuals and entities. While no national or regional court to date has invalidated national measures giving effect to a UN sanctions committee decision, these legal actions represent a potentially significant challenge to the efficacy of targeted sanctions. This is of particular concern, given the increasing importance of targeted sanctions in the global effort against international terrorism.

This is not an entirely new issue. Although the UN Security Council is not accustomed to dealing with individuals and non-state entities, concerns about human rights and procedural fairness were present during the three multilateral processes that contributed to the development of targeted sanctions. The Interlaken process on targeted financial sanctions addressed rights to petition for removal from the list of targets, the Bonn-Berlin process considered appeals of travel bans, and the Stockholm process on the implementation of targeted sanctions acknowledged the need to respect international humanitarian law and human rights.

More recently, the *High-Level Panel on Threats, Challenges and Change* noted in December 2004, "The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions."[6] Subsequently, the General Assembly in its September 2005 World Summit Outcome document called on the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions."[7] In response, the Secretary-General directed the Office of Legal Affairs to begin an interdepartmental process to develop proposals and guidelines to address such concerns.[8]

The perception of unfairness in the application of targeted sanctions has generated public opposition in several countries and occasional political embarrassment in others. Some Member States have indicated an increasing reluctance to add names to the lists of individuals and entities targeted by Security Council sanctions because of these concerns. More than 50 Member States have expressed concerns about the lack of due process and absence of transparency associated with listing and delisting.[9]

While these concerns are legitimate, it is important to keep the scope and magnitude of the problem in perspective. Only 925 individuals and entities are currently listed globally by the six UN sanctions committees actively listing, 46 of whom have been delisted to date. The 1267 Monitoring Team indicated in its latest report that while 345 individuals remain on the 1267 List, "requests [for exemptions]...have been made for just 23, and by only eight States (all but two from Europe)."[10] Also important to note is the fact that most of the cases subject to legal challenges stem from designations made in the months immediately following the attacks of 11 September 2001. Improvements since then in listing requirements and statements of case should reduce the likelihood of wrongful listings going forward.

Even if the total number is small and committee procedures have improved, the persistent perception of unfairness and potential violation of due process associated with targeted sanctions means there is a political problem that needs to be addressed. Failure to make the sanctions process more transparent, accessible, and subject to some form of review threatens to undermine the credibility and effectiveness of UN sanctions generally.

In some respects, the UN itself contributes to the perception of unfairness. Lack of transparency of sanctions committee procedures, even while having improved over the past several years, is part of the problem. Committee deliberations are appropriately confidential, but general information about the basis of decisions on listing, delisting, and exemptions is not ordinarily made public. Procedures for applications for exemptions or requests for delisting are generally available in committee guidelines, but not all committees have guidelines. There have been instances when individuals and entities designated by sanctions committees have reportedly found out about their listings from nonofficial sources.

Although the move to targeted sanctions during the 1990s was intended to reduce the human costs and unintended consequences of comprehensive sanctions, all sanctions, even targeted ones, have impacts and invariably restrict certain rights (described in more detail in Section Two of this report). It is important to remember that the imposition of sanctions is more of a political and administrative process than a legal one. Sanctions are imposed without the same standards of evidence, burdens of proof, and access to remedies of legal processes, but at the same time they are governed to some degree by administrative law procedures.[11] The fact that targeted sanctions may affect peoples' lives in a way comparable to penalties imposed in criminal proceedings, adds to the general perception of a lack of fairness.

More than half of the individuals and entities listed by Security Council sanctions committees are sanctioned as part of the global effort to prevent acts of terrorism. Recommending the introduction of fair and clear procedures is part of the broader effort to strike an appropriate balance between rights and security. Terrorism is a special case of targeted sanctions since there can be a reluctance to assert the primacy of human rights concerns in a terrorism case. The issue should not be viewed in terms of a trade-off between security and justice; rather, the two should be seen as mutually reinforcing. Strengthening procedural fairness can strengthen security and vice versa. Improving fairness and

clarity in the application of targeted sanctions will reinforce the global effort to use and implement targeted sanctions to counter acts of terrorism.

In the final analysis, should a regional or national court judgment challenge the application of national measures giving effect to a listing by a Security Council sanctions committee, the decision could undermine the effective implementation of UN sanctions. It could also challenge Article 103 of the UN Charter, which states that obligations under the Charter shall prevail over obligations Member States may have under any other international agreement. Prudent measures to ameliorate the situation could prevent potentially damaging legal challenges to targeted sanctions—challenges that could ultimately weaken the current global effort against terrorism.

This white paper surveys the legal issues, analyzes current sanctions committee practices, and recommends proposals to strengthen UN targeted sanctions procedures. Section Two examines legal aspects of the issue, with a survey of broad principles, recent legal challenges, and their implications. Section Three describes current procedures and practices in six different sanctions committees. Section Four presents specific recommendations and a range of options for responding to criticisms of current practices and for ensuring fair and clear procedures in implementing UN targeted sanctions. Section Five contains general conclusions.

SECTION TWO

Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law

*Larissa van den Herik and Nico Schrijver**

Part I of this section assesses generally which human rights may be affected by targeted sanctions. Part II analyzes the rights that appear most relevant in light of recent challenges, especially the right to a fair trial and the right to an effective remedy. Part III reviews the human rights challenges to sanctions regimes, with particular reference to human rights protection under the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in the context of European Union law. Lastly, Part IV assesses the implications of such human rights challenges for current UN procedures.

I. Targeted Sanctions and Human Rights in General

Since 1945, an impressive framework of human rights law has been agreed upon. Building on the few provisions on human rights in the UN Charter,[12] the landmark Universal Declaration of Human Rights was adopted in 1948.[13] Subsequently, two main International Covenants on Economic, Social and Cultural Rights (1966) and on Civil and Political Rights (1966), respectively, were agreed to as well as a series of specific human rights treaties such as those on racial discrimination (1965), women's rights (1979), torture (1984), children's rights (1989) and migrant workers (1990). Widely accepted since the 1993 Vienna World Conference on Human Rights is that human rights norms contained in this package are both universal and indivisible.[14]

In addition, regional human rights instruments have been adopted. The main ones are the European Convention for the Protection of Human Rights (1950), the Charter of Fundamental Rights of the European Union (2000), the American Convention on Human Rights (1969) and its Additional Protocol in the Area of Economic, Social and Cultural Rights (1988), and the African Charter on Human and Peoples' Rights (1981).

As noted in Section One, comprehensive sanctions were criticized in the early 1990s for their adverse humanitarian impact. While they were to some extent developed in response to human rights concerns, targeted sanctions, by definition, also affect individuals' rights.

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Like comprehensive sanctions, targeted sanctions can impinge upon several kinds of human rights. For instance, travel bans interfere primarily with freedom of movement,[15] whereas financial sanctions have an impact on property rights,[16] as well as possibly affecting a person's privacy, reputation, and family rights.[17] If these sanctions are wrongly imposed on listed individuals without granting these individuals the possibility of being heard or of challenging the measures taken against them, there may also be a violation of the right of access to court, the right to a fair trial[18] and the right to an effective remedy.[19]

In the extreme, sanctions could conceivably violate the right to life,[20] for instance if a travel ban prevents a targeted person from leaving the country to seek medical aid,[21] or when financial sanctions are so stringent that a targeted person does not have resources to buy basic goods such as food. However, existing UN sanctions regimes invariably include a possibility to grant exemptions precisely to avoid those kinds of situations.[22] The travel ban could also conflict with rights and freedoms such as the freedom of religion,[23] if the particular religion requires pilgrimages, and the right to seek asylum. It is noteworthy that UN sanctions committees have routinized exemptions for travel for religious purposes.[24]

II. Particular Human Rights at Stake: The Rights to a Fair Trial and an Effective Remedy

Currently, the most pressing human rights concerns regarding targeted sanctions relate to the perceived difficulty for the individual to challenge the sanctions taken against him. There are 15 known cases of targeted individuals and organizations who have initiated legal proceedings before national and regional courts. Legal challenges have been presented to the national courts of Belgium, Italy, Switzerland, The Netherlands, Pakistan,[25] Turkey, and the United States of America.[26] Before those national courts, individuals complained about being listed by the UN or directly about the sanctions themselves. In other cases, the national designation was challenged, or the court was asked to compel the home state to start a delisting procedure. Consequently, the character of national cases varies. Most of these cases are still pending. In addition to these national cases, claimants have also turned to regional European courts. Some of these European cases are analyzed in greater detail below.

The rights to a fair trial and an effective remedy lie at the heart of the debate. Therefore, these two rights are explored in detail in this section. Since important challenges before regional courts have been made in Europe, and that the European Convention for Human Rights (1950) is one of the few human rights systems that provide individuals a right of direct petition, the emphasis of the survey below is on the rights and procedures under this European Convention. It is appropriate to consider first the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (ICCPR, 1966), and in particular Articles 2(3) and 14 of the ICCPR. There is also an analysis with respect to their European counterparts, i.e. Articles 6 and 13 of the ECHR.

The Right to a Fair Trial and an Effective Remedy Worldwide (Articles 14 and 2(3) of the ICCPR)

The rights to a fair trial and an effective remedy are generally included in the Universal Declaration of Human Rights (UDHR). The right to a fair trial is included in Article 10 of the UDHR:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 8 of the UDHR on the right to an effective remedy reads:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In the ICCPR, the right to a fair trial is recorded in Article 14(1). The relevant part of this provision is:

> ... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

Similar to Article 6 of the ECHR, the standard set by Article 14 of the ICCPR (namely, "the right to a fair and public hearing by a competent, independent and impartial tribunal established by law") only applies to specific cases where the determination of a "criminal charge" is involved, or where "rights and obligations in a suit at law" are at stake.[27] In its General Comment on Article 14 of 1984, the Human Rights Committee did not define these two concepts in detail.[28] This has led scholar Manfred Nowak to plead in favor of an autonomous interpretation of these concepts under the ICCPR, regardless of national classifications, thereby limiting the possibility for state parties to circumvent the Covenant.[29]

However, the jurisprudence of the Human Rights Committee does not provide much assistance as to how the concept of "criminal charge" should be autonomously interpreted. It is generally assumed that the essence of the case law of the European Court of Human Rights (ECtHR) on Article 6 of the ECHR applies equally in the context of Article 14 of the ICCPR (see below) since the exact same words are in both provisions.[30]

As to the "civil-leg" of Article 14, it is remarkable that the ICCPR and the ECHR use different words, namely "rights and obligations in a suit at law" in Article 14 of the ICCPR versus "civil rights and obligations" in Article 6 of the ECHR. One might argue that somewhat different concepts are involved.[31] However, the distinction is absent in the French version of both treaties, where both versions speak of "*des contestations sur ses droits et obligations de caractère civil,*" and also may be presumed that generally the same concepts are at stake.

In the case of *Ivon Landry versus Canada* (1986), the Human Rights Committee noted the discrepancy between the English, French, Russian, and Spanish text on the expression "suit at law." In any case, it held that:

> ... the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than the status of one of the parties... In this regard each communication must be examined in the light of it particular features.[32]

Hence, there is a preference for a case-by-case analysis similar to the ECtHR case law as set out below. The Human Rights Committee held that the civil component of Article 14(1) covers cases concerning a disability pension of a former army member[33] and employment disputes of civil servants.[34] However, the committee also indicated that Article 14 does not necessarily apply to the imposition of disciplinary measures against civil servants.[35] In contrast to the ECtHR, the committee has so far left the question open whether the phrase "rights and obligations in a suit at law" covers asylum or expulsion procedures[36] and tax proceedings.[37] Given this diverse and open-ended case law, it is uncertain whether the committee would find that UN sanctions can be characterized as obligations in a suit at law and thus it is not entirely certain that Article 14 of the ICCPR is applicable.

The right to an effective remedy is included in Article 2(3) of the ICCPR. This provision reads:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The right to an effective remedy as enshrined in Article 2(3) does not have a general scope, but is only applicable when another right of the Covenant is involved. A UN sanction involving the freezing of assets would in the first place infringe on the right to access to property. However, this right is not included in the ICCPR, which might have consequences for the applicability of Article 2(3). In contrast, Article 8 of the UDHR provides for a right to an effective remedy for acts violating a wide range of fundamental rights if they are granted by constitution or by law.

Another significant difference between the two provisions is that Article 8 of the UDHR requires a remedy by a competent national *tribunal*, whereas Article 2(3) of the ICCPR speaks of competent judicial, administrative, or legislative authorities, which grants more room for nonjudicial remedies.

As with Article 13 of the ECHR, Article 2(3)(b) sets a lower standard since it does not require review by a judicial authority. The ECtHR provides more specific guidelines as to what this right may entail in practice, as is set out below.

The Right to a Fair Trial under the European Convention

Article 6 of the ECHR encompasses the right to a fair trial. The first sentence of paragraph 1 of the Article reads:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6 sets high standards ("fair and public hearing," "within a reasonable time," and "by an independent tribunal established by law"), but these standards apply only to civil and criminal law cases. The question again is whether the listing and the imposition of sanctions such as freezing can be qualified as either civil or criminal and therefore come within the realm of Article 6, or whether they are rather administrative measures or measures of a *sui generis* character that remain outside the scope of Article 6.

The ECtHR ruled that the concept of criminal charge bears an "autonomous meaning," which is independent of the characterization of a measure pursuant to national law.[38] Relevant considerations to determine whether a certain measure qualifies as a criminal charge are: "the nature of the offence charged, the severity of the sanction at stake (having regard in particular to any loss of liberty, a characteristic of criminal liability), and the group to whom the legislation is applied (small and closely defined groups of potential offenders are suggestive of a disciplinary or administrative rather than a mainstream criminal offence.)"[39]

In determining what constitutes a civil right or obligation, the ECtHR has been less straightforward. As with the concept of criminal charge, the concept of a civil right or obligation also has an autonomous meaning in the context of the ECHR, which is independent of national qualifications.[40] However, the ECtHR has not given general guidelines to determine whether civil rights or obligations are involved in a certain case, but it has chosen to deal with this issue on a case-by-case basis. As a result, expropriation of property[41] and some forms of social security[42] have been considered as coming within the realm of this part of Article 6(1), whereas disputes relating to tax liability[43] have so far been viewed as public law issues and not covered by Article 6(1) of the ECHR.

The issue of the status of targeted sanctions is particularly important with regard to the 1267 sanctions because targeted individuals are listed in this regime on the basis of their association with a terrorist organization. The criteria for listing bear a criminal law connotation, especially in the case of the Côte d'Ivoire sanctions, in which individuals can be listed on the basis of relevant information that they are responsible for serious violations of human rights and international humanitarian law or that they incite publicly hatred and violence.[44]

In addition to this criminal connotation of the listing criteria, some people have argued that the aim of the sanctions also appears to be punitive and that the effect of the sanctions may rise to a level that is similar to criminal sanctions. Yet the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities (1267 Monitoring Team) has consistently held that the sanctions are "designed to prevent terrorist acts, rather than provide a compendium of convicted criminals"[45] and that the sanctions cannot be characterized as being criminal in nature. The 1267 Monitoring Team also stated in this respect: "... after all, the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales."[46] Hence, the fact that there may be a criminal law connotation does not mean that the sanctions should be characterized as criminal sanctions.

Whether targeted sanctions can alternatively be qualified as civil obligations is difficult to answer given the casuistic case law of the ECtHR on this point. Presumably, the answer to this question will also be different for the different types of sanctions. Freezing of assets might be qualified as civil, but it is rather unlikely that travel bans will be so qualified.

From the foregoing it may be concluded that targeted sanctions are most likely not criminal sanctions. Even when individuals are listed on the basis of criteria that appear to come close to the definition of a crime, relevant aspects to consider are also the nature and the aim of the sanctions. Those latter two aspects at first glance do not sustain a conclusion that sanctions should be equated with criminal charges. In addition, it is also not certain that the ECtHR would consider the sanctions as civil obligations.

The qualification of sanctions as either criminal charges, civil obligations, or as measures of another character is important for two reasons in particular. First, the characterization indicates the evidence required for the statement of case that may lead to listing. If sanctions are characterized as criminal charges the required evidence for listing an individual would have to meet the standard of "beyond reasonable doubt." If, on the other hand, the sanctions are characterized as administrative then the evidentiary burden for listing is lower. In this case, it could still be maintained that the longer a person's name is on the list and the longer his assets are frozen, the more harmful the effect. On that basis, it might be argued that the evidentiary standard should be increased after an individual has been listed for a defined period of time, for example five years.

A second reason why the characterization is relevant is that characterizing sanctions as either criminal charges or as civil obligations would have direct consequences for the requirements of any possible review mechanism. If Article 6 is applicable, then the review mechanism must be judicial in nature. If Article 6 is not applicable, then the right to an effective remedy (Article 13 of the ECHR) may still apply, but this provision sets a lower standard since the remedy need not necessarily be judicial (see below).

As demonstrated in this section, there is room for discussion as to whether the sanctions fall within the realm of Article 6(1) of the ECHR on the right to a fair trial. Even if Article 6 were applicable, it may still be possible to limit the applicability on the basis of national security. The right to a fair trial in the ECHR is not phrased in absolute terms, as is for example the prohibition of torture in Article 3 of the ECHR. Therefore, it may be possible to invoke national security issues as a justification to limit certain rights under Article 6 of the ECHR. The text of Article 6 allows pronouncing judgment in closed session for reasons of national security. However, it does not mention the possibility to restrict other aspects of the right to a fair trial for national security reasons. As regards limiting or excluding the access to a court for national security reasons, the ECtHR has not given clear guidelines that apply directly to the due process issues arising in the context of UN sanctions. However, in the *Tinnelly* case, the ECtHR noted:

> 72. The Court recalls that Article 6 § 1 embodies the "right to a court," of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

> However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, § 50).[47]

Even assuming that the application of Chapter VII of the UN Charter offers grounds to declare a state of emergency, once Article 6(1) applies, there should be *some* access to a court. However, as noted above, Article 6(1) of the ECHR may not be applicable at all. If not, the ECHR can still pose procedural requirements, namely under Article 13, which holds the right to an effective remedy.

The Right to an Effective Remedy under the European Convention

Article 13 of the ECHR reads:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in official capacity.

As with Article 2(3) of the ICCPR, the right to an effective remedy as enshrined in Article 13 of the ECHR does not have a general scope, but is only relevant when another right of the convention is involved.[48] Different from the ICCPR, the right to property is included in Protocol 1 to the ECHR and is beyond doubt from that perspective that Article 13 of the ECHR is applicable. Furthermore, like Article 2(3), Article 13 of the ECHR does not require a judicial remedy, but speaks instead of a national *authority*, which appears to grant more room for nonjudicial remedies.

What qualifies as an effective remedy? Since the remedy need not be judicial, an ombudsman, administrative or other nonjudicial procedures may also qualify as long as they constitute *effective* remedies. To determine whether a certain remedy is effective, one should assess the powers, procedural guarantees and authority of the institution involved.[49] Furthermore, it also depends on the context of the case at hand whether a certain remedy can be deemed effective. For the purposes of this analysis, two cases may be of particular relevance: the *Klass* case and the *Leander* case. In the *Klass* case concerning secret surveillance, the ECtHR held that the remedy should be as "effective as could be having regard to the restricted scope for recourse inherent in any system of secret surveillance."[50] In the *Leander* case concerning security checks, the court further held that even if no single remedy under the national system might be effective on its own, the aggregate of remedies as a whole might still qualify as effective.[51]

More specific guidelines as to what constitutes an effective remedy might be found in a recommendation of the Committee of Ministers of the Council of Europe, which specifies the right to an effective remedy for rejected asylum seekers against decisions on expulsion.[52] In Recommendation R (98) 13,[53] the committee held that a remedy before a national authority is considered effective when:

- That authority is judicial; or, if it is quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence;
- That authority has competence both to decide on the existence of the conditions [...] and to grant appropriate relief;
- The remedy is accessible for the rejected asylum seeker.

Although of course not directly applicable, this recommendation may still provide useful guidance as to what is required under Article 13 of the ECHR.

In sum, this section demonstrates that various human rights may be compromised where targeted sanctions are concerned. Whether certain sanctions actually infringe upon specific human rights depends largely on the kind of sanctions involved. The most problematic issues concern procedures that are followed in applying targeted sanctions. As regards those procedural aspects, the main issues in applying financial sanctions and travel bans concern listing and delisting procedures, the procedural system of granting exemptions, and whether there is periodic review of the effectiveness and necessity of the sanctions imposed. The right to a fair trial would require judicial review of the sanctions, but we can ask whether that right is applicable to the administrative procedures by which UN sanctions are imposed. In contrast, it is likely that the right to an effective remedy is applicable. This right leaves more room for different kinds of remedies, as long as they are as effective as possible in the context of the situation in which they apply.

III. Human Rights Challenges to UN Sanctions Regimes

On several occasions, even before the sanctions against the Taliban, Osama bin Laden, and Al-Qaida were imposed, doubts were expressed about the basis of listing individuals who were then subject to UN sanctions. In particular, individuals listed by the subsequent Liberia Sanctions Committees voiced such concerns.[54] In the November 2005 report of the Panel of Experts on Liberia, the panel noted that it had received several complaints from individuals claiming to be unduly listed and thus undeservedly subjected to the travel ban. The complainants asserted they were not guilty, they lacked information as to why they were put on the list, and the reports from the panel were not objective. The complainants even threatened to sue the United Nations and the panel.[55]

Generally, individuals who claim to have been wrongly listed, according to the guidelines of most sanctions committees, can only submit a petition for delisting through the intermediary of their state of nationality or residence, hence, through some modern form of diplomatic protection.[56]

The first *legal* challenges to listing and the subsequent imposition of UN sanctions before international courts occurred in Europe, before the European Court of First Instance (ECFI) of the European Communities in Luxembourg in the cases of *Yusuf* and *Kadi*. Before these cases, the European Court of Human Rights (ECtHR) in Strasbourg dealt with challenges pertaining to the potential human rights violations resultant from the more comprehensive sanctions regime targeting

Yugoslavia in the *Bosphorus* case, and with challenges dealing with the execution of Security Council Resolution 1373 (2001) at the EU level in the *SEGI* case. These three cases are analysed in chronological order.

The European Court of Human Rights: The Bosphorus Case

In the *Bosphorus* case, the sanctions imposed on Yugoslavia in 1991 included an arms embargo and impounding aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro).[57] Two airplanes that had been leased by the Turkish company Bosphorus from the Yugoslav company JAT were eventually impounded in Ireland on the basis of EC Regulations implementing the UN sanctions. Bosphorus challenged these measures before Irish national courts, which then requested the European Court of Justice for a preliminary ruling. In its answer, the European Court of Justice noted:

> 22 Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.
>
> 23 Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.[58]

The court found that the aircraft could be subjected to the sanctions measures and, consequently, the aircraft were not released. Bosphorus then lodged a complaint at the ECtHR claiming a violation of its right to property. This court also condoned Ireland's actions to impound the aircraft pursuant to the EC regulations. It stated:[59]

> 155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited M. & Co. decision, at p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.
>
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
>
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (Loizidou v. Turkey (preliminary objections), judgment of 23 March 1995, Series A no. 310, § 75).

In applying its standard to the case, the court only reviewed whether the EC offered "equivalent" protection, and did not apply the equivalent-test to the UN. The court avoided the fact that the UN Security Council lies at the root of it all, stating:

145. It is true that the "genesis" of EC Regulation 990/93 was a UNSC Resolution adopted under Chapter VII of the UN Charter (a point developed in some detail by the Government and certain third parties). While the Resolution was pertinent to the interpretation of the Regulation (see the opinion of the AG and the ruling of the ECJ, paragraphs 45-50 and 52-55 above), the Resolution did not form part of Irish domestic law (Mr Justice Murphy, at paragraph 35 above) and could not therefore have constituted a legal basis for the impoundment by the Minister for Transport of the aircraft.

In sum, although Bosphorus as an allegedly innocent third party was clearly adversely affected by the sanctions on Yugoslavia, this was considered justifiable in several instances by the two main European courts which concluded that no human rights violation could be found.

The European Court of Human Rights: The SEGI Case

The *SEGI* case before the ECtHR regarded measures taken by the EU with a view to implementing UN Security Council Resolution 1373 (2001).[60] This resolution obliges Member States to implement certain anti-terrorism measures. The Counter Terrorism Committee (CTC), established to monitor the implementation of Resolution 1373, does not by itself impose sanctions, and thus, is not a sanctions committee. The CTC does not draw up lists of individuals to whom the measures should be applied, but relies on the list developed by the 1267 Committee, individual Member States, or regional organizations.

The EU implemented Resolution 1373 (2001) by the Common Positions 2001/930/CFSP and 2001/931/CFSP and drew up several lists of individuals and organizations. The Youth Basque organization SEGI was placed on one of the lists of individuals and groups involved in terrorist acts. SEGI complained against this listing before the ECtHR, and invoked several rights such as the right to be presumed innocent, the freedom of association, the right to a fair trial, the freedom of expression, and the right to property. However, the Human Rights Court declared the complaint inadmissible because it found that SEGI was not a victim of any violation of rights under the European Convention of Human Rights. Referring to standing case law, the court recalled that it is not possible to complain about potential violations that may occur in the future or about the law *in abstracto*. The court noted that Common Position 2001/931/CFSP to which the list was an annex was not directly applicable in the Member States. Moreover, the applicants had not adduced any evidence that any particular measures had been taken against them on the basis of the Common Position. The court held that the fact that SEGI appeared on the list "may be embarrassing, but the link is much too tenuous to justify application of the Convention. The reference [...] does not amount to an indictment of the 'groups or entities' and still less to the establishment of their guilt."

The court did not answer the question whether the possible sanctions that could be imposed as a result of the listing were fully compatible with the convention. However, it clearly found that mere listing is insufficient for claiming to be the victim of a human rights violation.

Subsequently, SEGI lodged a complaint at the European Court of First Instance (ECFI) in Luxembourg, challenging its inclusion in the EU list. Yet for technical reasons pertaining to EU law and the EU system, this complaint was also declared inadmissible.[61] In the judgment, the president

expressly remarked that it seemed probable that SEGI would not have any access to a court—be it at the national or regional level.[62]

The European Court of First Instance: The Cases of Kadi and Yusuf (2005)[63]

A Swede of Somali origin, Ahmed Ali Yusuf; a Sweden-based organization, Al-Barakaat; and a Saudi national and resident, Yassin Abdullah Kadi—all of whose assets were frozen in accordance with the 1267 Sanctions Committee—challenged the legality of the EC regulations that implemented the UN Security Council Resolutions before the European Court of First Instance (ECFI) of the European Union.[64] All applicants maintained that the regulations should be annulled. Apart from two arguments about the unlawfulness of the regulations under the EC system, the claimants submitted that the regulations violated fundamental human rights and were thus unlawful on that basis. Because the EC organs that had enacted the regulations were given no discretion whatsoever, it was, in fact, the underlying Security Council actions that were challenged before the European Court.

The judgments in these two cases were rendered on 21 September 2005. Overall, the ECFI upheld the primacy of the UN Security Council, although it did review whether the actions of the council were compatible with norms of *jus cogens*. For the purposes of this report, two aspects of the judgment are particularly relevant: (1) the review exercised by the European Court, and (2) the court's qualification of some human rights as norms of *jus cogens*.

Review of UN Security Council Action

As stated above, the actions that were actually under review in the Kadi and Yusuf cases were not so much the EC Regulations, but rather UN Security Council resolutions and decisions of its subsidiary organ, the 1267 Committee. The argument that these resolutions and subsequent decisions breached fundamental human rights brought to the fore the highly sensitive issue of judicial review of UN Security Council decisions. To date, the principal judicial organ of the United Nations, the International Court of Justice, has been hesitant to review UN Security Council resolutions, as demonstrated by its reluctance to review the legality of Resolution 748 (1992) in the Lockerbie case.[65] However, it appears that specialized international courts and tribunals are less reluctant to perform this task. For instance, the *ad hoc* criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) assumed "inherent jurisdiction" to review their establishment by the UN Security Council when asked to do so by defendants.[66] Unsurprisingly, both tribunals reached the conclusion that their establishment was legal. In the cases of Yusuf and Kadi, the European Court of First Instance of the European Communities (EC) also felt competent to address the substance of the question of the relationship between UN Security Council resolutions and other international legal instruments and rules.

The ECFI first established that the EC and the court itself were bound by the UN Charter. The court held that although the UN Charter was not directly applicable to the EC as such, the EC was still bound by Security Council resolutions by virtue of Articles 297[67] and 307[68] of the EC Treaty.[69] The court then inquired whether it had the power to review UN Security Council actions and concluded it

did not because Articles 25 and 48 of the UN Charter provide that UN Security Council decisions are binding on all UN Member States and Article 103 of the UN Charter grants the UN Charter a special and higher status than other international treaties.[70] The ECFI held that it had no authority to review whether UN Security Council resolutions were consistent with fundamental rights as protected by the Community legal order. However, the European Court did find itself empowered to check whether the UN Security Council resolutions were consonant with norms of *jus cogens*, since, the court said, these rules have a higher status, are nonderogable, and are binding on all subjects of international law, including UN organs.[71]

The submission that *jus cogens* is binding on the UN Security Council is in itself logical. Yet one can comment about the subsequent observation of the Court that UN Security Council resolutions which do not observe *jus cogens* fail to bind the UN Member States. The obvious question that the European Court does not answer is who decides whether a certain resolution violates *jus cogens*? Can a single Member State or a regional court invoking *jus cogens* choose not to comply with UN Security Council resolutions on the charge that they do not concur with norms of *jus cogens*? Does this not risk undermining the whole system of collective security?

Qualification as Jus Cogens

The second notable aspect of the recent judgment concerns the process undertaken by the EC Court, or not really undertaken, to determine whether the human rights invoked constitute *jus cogens*. The applicants invoked three human rights in their cases: the right to property, the right to a fair trial, and the right to an effective remedy. The key question is whether these rights have the status of *jus cogens*.

Article 53 of the widely ratified Vienna Convention on the Law of Treaties (VCLT, 1969) provides a definition of *jus cogens*, namely "a peremptory norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent peremptory norm." In February 2006, the International Court of Justice authoritatively endorsed the concept of *jus cogens* in the case of *Armed Activities on the Territory of the Congo* (The Democratic Republic of the Congo v. Rwanda).[72] In the Commentary to the Draft Articles on State Responsibility of the International Law Commission the following examples of *jus cogens* norms are given: the prohibition of aggression, genocide, slavery and slave trade, racial discrimination and *apartheid*, torture, and the right to self-determination.[73]

The question is: should the right to property, the right to a fair trial, and the right to an effective remedy be added to this list?

The Right to Property

As regards the right to property, the court held that an arbitrary deprivation of property *might* be considered a violation of *jus cogens*. However, the court also held that in the instant case, taking account of the possibilities of granting exemptions to the sanctions regime as provided in Resolution 1452 (2002), there was no arbitrary, disproportionate, or inappropriate interference with fundamental

rights of persons. In arriving at this conclusion, the court also observed that the measures had been taken as part of the UN action against terrorism. It thus balanced the impact of the measure against its aim. The court further noted that the assets of the applicants had been frozen and not confiscated, and it referred to the overall system of periodic review of the sanctions.[74]

The court did not actually say that the right to property constituted a *jus cogens* norm, but implicitly recognized it because the judicial review was expressly limited to *jus cogens* norms.[75] During its argumentation, the court also referred to the prohibition of inhuman and degrading treatment, which would more easily qualify as a *jus cogens* norm than the right to property, given the requirement of article 53 VCLT that a *jus cogens* norm must be recognized as such by all Member States.

In sum, the court was vague about whether and to what extent the right to property constituted *jus cogens*, but was clear about the fact that this right had not been violated in the instant cases.

The Right to a Fair Trial and the Right to an Effective Remedy

The right to a fair hearing concerns the applicants' claim that this right was violated because they were not given an opportunity to be heard after the sanctions were imposed and thus did not have the possibility to contest the 1267 Committee's decision to put them on the list.

Addressing this claim, the court pointed to the possibility of reexamination given by the 1267 Committee's Guidelines of November 2002. Based on these guidelines, states may exercise some diplomatic protection and start a delisting procedure before the 1267 Committee on behalf of their nationals and residents. The court held that this procedure was sufficient to rebut any claims about violations of the right to be heard, as well as claims about the lack of an effective remedy. In reply to the argument that individuals still had no *locus standi* on their own and that they were dependant on the goodwill of their governments, the court argued that a national of an unwilling state could compel his state through domestic action to submit his case to the 1267 Committee.[76] This is a progressive statement of the court since the provision that states have a *legal duty* rather than merely a right and perhaps a moral obligation to exercise diplomatic protection was not even included in the ILC Draft Articles on Diplomatic Protection in 2004.[77]

Appeal by the Applicants

On 24 November 2005 and 1 December 2005 respectively, Kadi and Yusuf appealed against the judgment of the ECFI. Their first claim concerned the legal basis for the sanctions under the EC system. Second, Kadi claimed that the ECFI had made an error in law when it found that the EC was obliged under the UN Charter to implement Resolution 1267 and subsequent resolutions without an independent review procedure for persons claiming to have been wrongly put on the list. Yusuf argued more generally that the ECFI erred in holding that the right to a fair hearing and an effective legal remedy were not violated.[78]

IV. The Implications of the Human Rights Challenges for the UN Procedures

A first observation that follows from the above review of these cases regards the distinction between the more comprehensive sanctions as applied on Yugoslavia in the *Bosphorus* case and targeted sanctions as applied by UN Security Council Resolution 1267 in the *Yusuf* and *Kadi* cases. Although comprehensive sanctions may cause direct harm to many innocent people and entities, such as allegedly the Turkish company Bosphorus, the call for review mechanisms has been expressed mainly about targeted sanctions. In contrast to comprehensive sanctions, targeted sanctions are directed at specific individuals and entities because of their suspected ties to terrorist organizations or their exercise of some activity proscribed by the UN Security Council. Although these specific individuals and entities may not necessarily be innocent and are in any case suspected of some association with a terrorist organisation,[79] it has been in the context of targeted sanctions that the concerns of the lack of legal remedies have been manifested as most pressing.

Clearly, a weakness of targeted sanctions is the lack of (adequate) remedies within the UN system. As a consequence, many individuals have initiated cases before national or regional courts. Moreover, it is notable in this respect that Yusuf and Kadi did not appeal against the ECFI's findings on the right to property, but they did express their disagreement with the findings on fair trial rights. The ECFI's reference to the system of diplomatic protection as the sole remedy available for listed individuals to start the delisting process may not be convincing on appeal to the ECJ. The proposals of the 1267 Monitoring Team in its third and fourth reports— requiring states to forward petitions for delisting to the 1267 Committee, even if they do not agree with the petition, and to enlarge the number of Member States that may initiate a delisting procedure—might serve well to address this legal caveat to a certain extent.[80] However, eventually these proposals endorse the existing system, while trying to strengthen it in terms of due process concerns. The question is whether this is sufficient or whether somewhat more drastic reforms are required.

In this respect, it may be noted that the ECJ may apply a stricter test on appeal than the ECFI has in first instance. The ECJ may well decide to extend its examination beyond *jus cogens*. In comparison, the *ad hoc* criminal tribunals (ICTY and ICTR) when reviewing the Security Council Resolutions on their establishment did not use the concept of *jus cogens*, but tested against the purposes and principles of the United Nations. The purposes and principles of the United Nations might be said to include human rights, and then the ECJ could argue that the Security Council is bound by all generally accepted human rights, regardless of whether they constitute *jus cogens* or not. Such a strict test might well lead to a different conclusion on the legality of the sanctions under review. In addition, it is likely that the ECtHR will also apply a stricter test if confronted with the question on the compatibility of targeted sanctions with human rights standards. In contrast to the ECFI and the ECJ, which are EC courts that in their regular proceedings do not often deal with human rights, the ECtHR is exclusively a human rights court, and may thus be expected to approach the matter from a pure human rights perspective. So far, the ECtHR has not had the opportunity to deal specifically with the question of whether the procedures followed by UN sanctions committees are consistent with the right to a fair trial and the right to an effective remedy. Given its current case law on these two rights, the ECtHR may prove to be somewhat more stringent than the ECFI has been in the cases of *Yusuf* and *Kadi*. In

this respect, the *Bosphorus* case may also be recalled, in which the ECtHR stated that the presumption that an international organisation offers "equivalent protection" of human rights may be rebutted by showing that the protection of convention rights was "manifestly deficient". In contrast to these possible stricter tests, the ECFI more or less accepted the status quo.

As shown, it is questionable whether Article 6(1) of the ECHR on the right to a fair trial applies. Yet Article 13 of the ECHR does have relevance. In the context of this provision on effective remedies, the ECtHR has already accepted that there may be security situations in which the effectiveness of remedies can be limited. According to the ECtHR, Article 13 does require that an organ dealing with claims by individuals of human rights violations should have a minimum level of impartiality and independence and should be accessible to the individual. However, the ECtHR recognizes that the remedy has an administrative rather than a judicial character. In sum, prognoses on the ECtHR's position on the current procedure of the sanctions committees remain speculative, but it may be presumed that this court will be somewhat more demanding than the ECFI. Moreover, it has been demonstrated that the ICCPR poses similar requirements. Therefore, national courts of states, parties to the ICCPR, or those applying customary international law may also scrutinize the UN sanctions in light of the right to a fair trial or the right to an effective remedy, and they may also come to different conclusions than the ECFI has.

The analysis of European judgments so far demonstrates an interorganizational hierarchy and reluctance on the part of the European courts to assess UN practices in a substantive way. The courts show that they are well aware of the existing hierarchy and the special position of the UN and especially that of the UN Security Council. Yet the courts also have made it clear that in cases of clear and flagrant human rights violations they will not shy away from acting. As follows directly from the *SEGI* case, just because a person is listed will not rise to that level.[81] Perceptions of arbitrary listing and especially persistent difficulties of being delisted in the light of contradictory indications of innocence may give, and already has given, rise to serious concerns. Moreover, as already indicated, numerous cases are pending before national courts all over the world. As noted by the 1267 Monitoring Team in its Third Report, "any improvement in due process reduces the risks of an adverse decision that could complicate implementation."[82]

SECTION THREE

Current Practices of UN Security Council Sanctions Committees

Important variations exist across different UN Security Council committees responsible for the supervision and implementation of targeted sanctions. This is often appropriate, due to the need to tailor targeted sanctions to specific situations and contexts to make them effective and practicable. For example, in the 1267 Committee delisting requests are primarily handled on a bilateral basis between the Designating State and the Petitioned State (in most cases the designee's state of nationality or residence). Conversely, individuals on lists administered by the Liberia and Côte d'Ivoire Committees have the right to look beyond their own governments and directly petition a UN office when seeking exemptions or delisting. This alternative pathway reflects largely the collapse of state institutions and the degree of factionalism within the region. The variation in practices can be problematic to the extent that different sanctions committees utilize different practices and end up with different standards of procedural fairness.

There have been important changes in procedures within different sanctions committees over time. This results in part from concerns expressed about the need for fair and clear procedures by individual Member States. It is also a result of reforms introduced within the committees themselves (by their chairs, members, or monitoring teams) stemming from challenges to their practices and perceptions of ineffectiveness or unfairness of the targeted sanctions. Significant changes to listing, delisting, and procedural issues are summarized in Chart I. Since 1999, there has been consistent, incremental movement toward addressing procedural concerns—a form of institutional learning within the 1267 Committee. Other committees targeting sanctions have drawn on precedents and procedures developed by the 1267 Committee, as well as from each other.

That being said, additional improvements could certainly be made. Important criticisms of current procedures have been lodged against UN sanctions committees, and these concerns deserve closer scrutiny. In the section that follows, procedural and fairness concerns are grouped into three broad categories relating to:

I. Designation or Listing Procedures;
II. Procedural Operations of the Committees;
III. Delisting Procedures.

Current practices within each of these broad categories, dividing each into subcategories, as appropriate are examined. We describe the range of current practices, generalize about operational norms to the extent possible, and identify some of the principal objections, criticisms, concerns, and challenges that have been raised about them. We recognize the complex and interdependent nature of these different aspects of the issue (listing, delisting, and general procedures). Some broad concerns

about fair and clear procedures identified in Section One and elaborated upon in Section Two can be addressed by differing degrees of changes in each.

We focused particularly on the procedures of the 1267 Committee since it lists the largest number of individuals and entities and is the most developed procedurally of the sanctions committees. In addition, the 1267 List is unique in its global, rather than national or regional, focus on nonstate actors. The sanctions are also primarily preventative in nature, whereas most other UN targeted sanctions are principally designed to change behavior.

Chart I: Highlights of Procedural Changes in the Administration of UNSCR 1267

Date	*Listing*	*Delisting*	*Procedural*
02/2000			Committee approves exemptions on flight ban for the Hajj.
02/2001			Committee approves procedures for humanitarian aid exemptions.
01/2002	UNSCR expands those subject to sanctions from those associated with bin Laden and Al-Qaida to those associated with bin Laden, Al-Qaida, the Taliban, or other groups, undertakings or entities associated with them.		UNSCR 1390 introduces additional exemptions to travel ban.
08/2002		Committee announces delisting procedures.	
11/2002	Committee issues Guidelines.	Committee issues Guidelines.	
12/2002			UNSCR 1452 introduces exemptions to financial sanctions, including 48 hrs. NOP for extraordinary expenses.
01/2003	UNSCR 1455 emphasizes importance of identifying information.		UNSCR 1455 requires Committee to communicate list to MS every three months.
04/2003			Committee revises Guidelines; includes new section on updating lists.
01/2004	UNSCR 1526 requires MS to include detailed identifying information and background information.		
07/2005	UNSCR 1617 requires detailed statements of case; clarifies those subject to targeted sanctions; requires MS to inform target; permits release of information about listing.		
12/2005	Committee revises Guidelines, makes technical changes to listing procedures.	Committee revises Guidelines, makes technical changes to delisting procedures.	Committee revises Guidelines; includes new section on exemptions.

I. Designation or Listing Procedures

Listing practices can be divided into four major subcategories: (A) the adequacy of information required for listing (as codified in statements of case); (B) the amount of identifying information provided for each listing; (C) operational details of the committee process to decide to list an individual or entity; and (D) notification of decisions.

Table I: Listing[83] summarizes current practices of seven UN Security Council committees targeting sanctions (Al-Qaida/Taliban, Sierra Leone, Iraq, Liberia, the Democratic Republic of Congo, Côte d'Ivoire, and Lebanon/Syria) related to the listing process. The summary assessments are based on a reading of the most recent published guidelines of each of the committees, relevant resolutions, and interviews with committee members and staff. The tables are necessarily incomplete, given the lack of public information available on some committee practices and the dynamic nature of committee operations.

A. Adequacy of Standards and Criteria for Listing

Although the criteria for listing obviously vary according to the situation, virtually all of the committees require a narrative description and justification for each listing. What this means in practice varies considerably across committees and within them. For example, the 1267 Committee statements of case tend to be one and a half pages long, while the Liberia Committee tends toward two or three paragraphs. The Democratic Republic of Congo (DRC) Committee has an explanatory column for proposed designations.

More significant, recent statements of case presented to the 1267 Committee reportedly vary in length and quality. At one end of the continuum, a joint submission from two Member States recommending the listing of three individuals allegedly included a general background on the organization with which they were affiliated, followed by six detailed paragraphs on each individual, with specific information relating to actions they have allegedly taken. Another statement of case proposing the listing of six individuals included 70 pages of faxed material, including copies of arrest warrants. At the other end of the spectrum was a statement of case that purportedly included 74 names, with only a single, general paragraph of justification. Due to the general nature of the statement of case, a hold was placed on the latter request and the committee did not list the names.

There has been general improvement over time in the quality and amount of justificatory information included in statements of case, but the process has elicited a number of criticisms from those directly involved in the exercise.

Some argue that the criteria for listing (i.e., "obstructing the peace process" or "associated with Al-Qaida and the Taliban") are too broad, although there has been progress with UNSCR 1617's definition of "associated with."[84] More far-reaching is the criticism that despite recent improvements, there is still not enough justifying information provided in most statements of case.

Table I: Listing[i]

	Al-Qaida/ Taliban (1267)	Sierra Leone (1132)	Iraq (1518)	Liberia (1521)[ii]	DRC (1533)[iii]	Cote d'Ivoire (1572)	Lebanon/Syria (1636)
Listed indivs/ entities (total)	347/119 (466)	30/0 (30)	89/206 (295)	77/30 (107)	15/1 (16)	3/0 (3)	0/0 (0)
Criteria for listing	Individuals, groups, undertakings or entities associated with Al-Qaida or Taliban, or those controlled by their associates	Member of former military junta and RUF, adult in their family	Saddam Hussein, senior officials, immediate family, entities controlled by these parties, former government officials	T: Taylor and family, close associates, officials of regime F: Individuals threatening peace process	Foreign and Congolese armed groups not party to Global and All-inclusive agreement	Threat to peace and national reconciliation, violating human rights and int'l law, obstructing UN and French forces	Individuals suspected of involvement in the Hariri assassination
Grounds	Statement of case with the basis for the proposal, identifying/ background info on association		Narrative description and justification	Narrative description and justification		Narrative description and justification	Description of grounds
Identifying information (individual)	Name, DOB, POB, nationality, aliases, residence, passport or travel doc #	Name, title	Name (Arabic and English), DOB, POB, nationality, aliases, title, residence, passport or travel doc #	Name, DOB, POB, nationality, aliases, title, residence, passport or travel doc #	Name, DOB, POB, aliases, passport/ identifying information	Name, DOB, POB, nationality, aliases, title, residence, passport or travel doc #	Name, DOB, POB, aliases, nationality, res., passport or travel doc #, title, financial information

[i] In Tables I-III abbreviations are used; they are as follows: IO = International Organizations; NOP = No Objection Procedure; T = Travel—Preventing the entry into or transit of Listed individuals through states other than that of sanctions committee; F = Financial—Freezing funds, financial assets and economic resources of individuals and entities, including funds derived or generated from property owned or controlled directly or indirectly by individuals and entities associated on list, and preventing access to funds or financial resources to individuals or entities on list; MT = Monitoring Team; MS = Member States, UN = United Nations, Blank box = Information not found in relevant resolutions or guidelines.

Currently the Sudan Committee (established under UNSCR 1591) has listing guidelines under active consideration. The Sudan Committee oversees travel and financial sanctions, although no individuals or entities have been listed as of March, 2006. The sanctions target those who impede peace process, constitute a threat to stability in Darfur and the region, violate international humanitarian or human rights law, conduct offensive military over-flights in Darfur, and/or violate the arms embargo.

[ii] The Liberia Committee maintains separate Travel Ban and Assets Freeze lists, each with distinct procedures and guidelines. The information included above is derived from procedures concerning the Assets Freeze list.

[iii] Across the committees, the level of comprehensiveness of published guidelines and procedures vary. For example, the DRC Committee does not have public guidelines or procedures—beyond information in relevant resolutions—for the application and administration of the 1533 List.

Table I cont.	Al-Qaida/ Taliban (1267)	Sierra Leone (1132)	Iraq (1518)	Liberia (1521)[i]	DRC (1533)[ii]	Cote d'Ivoire (1572)	Lebanon/Syria (1636)
Identifying information (group/ entity)	Name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business, leadership		Name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business, leadership	Name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business, leadership	Name, acronyms, address	Name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business, leadership	
List(s) Maintained by Committee	Travel, financial[iii]	Travel	Financial	Travel, financial	Travel, financial	Travel, financial	Travel, financial
Time to review (NOP)	5 days		3 days	2 days		2 days	2 days, 15 days if objection
Dissemination of decision	Note to MS, IO, Interpol, website, press releases, MS to inform target	Press release, website	Communicated to MS, website	Press release, website	Press release, Note Verbale, website	Press release, Note Verbale, website	Inform MS

Additionally, there is often little transparency concerning the sources of information cited in statements of case. To strengthen targeted sanctions, Member States proposing names to include on the list need to submit as much justifying information in support of the case as reasonably possible. Quality and consistency in the standards and criteria employed for listing is also important for the legitimacy of sanctions committees because their application of targeted sanctions needs to be impartial and should not be subject to interpretation as arbitrary.

There is typically little advance consultation with affected Member States (of residence or nationality of the listed individual), particularly if they are not currently serving on the Security Council. Only those countries that are current members of the Security Council automatically receive and are able to review statements of case, but not all Member States. This raises questions about the transparency of the listing process, with some Member States arguing that a version of the statement of case (a redacted version, deleting sensitive information) should be made more widely available.

[i] The Liberia Committee maintains separate Travel Ban and Assets Freeze lists, each with distinct procedures and guidelines. The information included above is derived from procedures concerning the Assets Freeze list.

[ii] Across the committees, the level of comprehensiveness of published guidelines and procedures vary. For example, the DRC Committee does not have public guidelines or procedures —beyond information in relevant resolutions—for the application and administration of the 1533 List.

[iii] Individuals and entities included on the 1267 List are subject to financial and travel sanctions as well as to an arms embargo. Other sanctions regimes employ arms embargos but do not include subjects of the embargos on their consolidated lists.

B. Adequacy of Identifying Information

There has been considerable improvement over time in the amount of identifying information provided by sanctions committees to implementing Member States. Gone are the early days of the Angola Committee when no more information than the nickname *"Big Freddy"* was considered sufficient identifying information in the case of one listed individual.

In contrast to the adequacy of information required for listing, there appears to be more consistency today across different sanctions committees with regard to expectations for identifying information for individuals and entities. The prevailing norm for individuals is provision of name (sometimes in local language), date of birth, place of birth, nationality, any known aliases, residence, and passport or travel document numbers. Some committees (Sierra Leone, Iraq, Liberia, and Lebanon/Syria) also indicate titles. The norm for entities is to provide a name, acronym, address, headquarters, subsidiaries, affiliates, fronts, and the nature of business leadership. The notable exception to this is the DRC Committee, which calls for only names and acronyms of listed entities.

In spite of these prevailing norms, there is often a gap in the amount of identifying information actually available. The names and aliases for individuals and fronts for entities are notoriously difficult to come by. Passport and travel document numbers are also lacking in many instances. As of November 2005, for example, the DRC Committee had no birth dates or passport numbers on listed individuals. Commonly used names (e.g., Charles Taylor) also require more detailed identifying information to ensure that sanctions are not applied to the wrong individual.

In contrast to the adequacy of justifying information for listing, there are relatively few criticisms of the current norms. Extant complaints identify the need for more information and note that it is sometimes difficult to update information for those listed on some committees.[85]

C. Committee Decision Making

All of the sanctions committees targeting sanctions operate on the basis of consensus of their members. Committees differ with regard to the time to review decisions to list. The Liberia and Côte d'Ivoire Committees allow a two-day no objection procedure to operate, the Iraq committee uses three days, and the 1267 Committee recently extended its time to review from two to five days.[86] Neither the Sierra Leone nor the DRC Committees specify a time period.[87] In practice, committees with a two-day time to review often have extended the period, as necessary.

There are significant limitations in the capacity of many Member States to respond to proposals for listing within 48 hours. By the time they are notified, their relevant home ministries may have closed for the day (because of differences in time zone from New York), and they have less than a day to decide whether to challenge and put a hold on a listing. As a result, individuals proposed for listing are presumed to meet the listing criteria, unless a Member State places a hold on a case. In some instances, a Member State may be reluctant to place a hold on a case due to the amount of time that will need to be devoted to challenging the Designating State and the fact that placing a hold will

invariably move the issue up on the bilateral agenda with the Designating State (possibly at the expense of other important bilateral issues).

There are occasions where a Designating State provides a prenotification to some, but not all, members of the UN Security Council as much as three weeks in advance. This prenotification accelerates the process and reduces the number of holds placed on committee decisions, but not all members of the UN Security Council are given the benefit of prenotification. There were 22 holds placed on the 1267 Committee petitions at the end of 2005, 11 of which related to proposed listings.

D. Notification

Notification is common in applying administrative measures in many countries, notably in the US and the UK. With regard to listing by a UN sanctions committee, there are two types of notification involved: notification to Member States and notification to individuals or entities listed.

Concerning general notification to Member States, the guidelines of the 1267 and the Iraq Committees stipulate that the committees communicate directly with Member States, as well as issue press releases, which are published on their websites. Although the practices of the Liberia and Côte d'Ivoire Committees in disseminating decisions may not differ from those of the Iraq or 1267 Committees, their guidelines suggest a more indirect approach, and specify the use of a Note Verbale and press releases, the latter of which are also published on the committees' websites.

With regard to notification to individuals or entities listed, *none* of the sanctions committees directly notifies the targets.

There have been numerous criticisms of the adequacy of both types of notification. Inadequate notification of Member States shifts the burden of keeping abreast of developments onto Member States and undercuts the efficiency and scope of implementation. More significant is the consequence of inadequate notification to a listed individual or entity. Adequate notification is central to procedural due process. Listed individuals and entities need to be informed of their listing, indicating specifically the basis of and reasons for their inclusion on the list. Sanctions committees largely rely on Member States to notify the targets of sanctions of their designation, exemptions procedures, and procedures for applying for a delisting. Member States have an obligation to support the UN and notify individuals and entities of their listing. Whereas relying on relevant Member States to notify targets works effectively in many instances, it can be ineffective when Member States lack the general capacity or the will to carry out a committee's request for notification.

II. Procedural Operations of Sanctions Committees

This section addresses the general procedures utilized by sanctions committees to maintain and review their lists, including their general practices to grant exemptions, considered in subsection A. Some committees have adopted periodic reviews of pending issues, considered in subsection B, a step that

addresses concerns about the general transparency and responsiveness of committees to the requests of Member States and the individual and entities they represent, considered in subsection C.

A. Exemptions

In the area of exemptions, sanctions committees have made significant progress in adopting standardized definitions of basic needs, establishing general criteria for exemptions, and recognizing the need to consider extraordinary expenses on a case-by-case basis. Sanctions committees actively engaged in listing individuals and entities appear to have institutionalized and routinized the definition of basic needs, to include "payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges."[88] It is important to stress that this standardization means that individuals targeted by sanctions are not being deprived of basic needs, as long as they are able to avail themselves of the right to petition for an exemption. Targeted sanctions can thus be considered proportionate in the sense that because of the provision of exceptions for the provision of basic needs, they do not interfere inappropriately with fundamental human rights. The number of exemption requests varies from committee to committee, but the 1267 Committee receives approximately one petition per week (including listing, delisting, and exemption requests).

Some variation across committees exists. UN Security Council resolutions appropriately vary, and some committees have fewer possibilities to grant exemptions for liens and judgments than others. As a result, only half of the committees surveyed exempt payments for outstanding financial obligations, such as liens or judgments from judicial proceedings. Similarly, less coordination exists in guidelines specifying the information required for exemptions. Only the 1267 Committee and Lebanon/Syria Committee (1636 Committee) spell out the identifying information required for a financial waiver, and only the Liberia, Côte d'Ivoire, and 1636 Committees specify the type of information needed for an exemption to the travel ban.

In the case of exemptions, the Member State advancing an individual's request for an exemption increasingly plays an important role as intermediary between the listed individual or entity and the sanctions committee. In this role, the Member State assumes the responsibility of representing the listed party, in addition to checking the accuracy of identifying information, and notifying individuals, entities, and institutions (including banks and airlines) of changes to the list or the additional exemptions, or both. Member States with limited resources may have a lower capacity to perform these functions. There may also be circumstances in which Member States are reluctant to forward petitions. No one knows, for instance, how many requests for exemptions are not forwarded by Member States.

Some other problems remain with granting exemptions. It remains unclear, for example, when, if, and on what basis corporate entities should be eligible for exemptions. There have also been concerns that there are no absolute time limits for committees to deal with requests for exemptions. In at least one instance, an exemption request has been pending for three years.[89]

Table II: Procedures[i]

	Al-Qaida/ Taliban (1267)	Sierra Leone (1132)	Iraq (1518)	Liberia (1521)	DRC (1533)	Cote d'Ivoire (1572)	Lebanon/ Syria (1636)
Review of pending issues	Monthly			T: Every 3 mos. F: Every 6 mos.		Every 3 mos.	
Grounds for exemption to financial assets freeze[ii]	Interest and income from contracts, agreements or obligations that arose prior to freeze		Payment of lien or judgment	- Payment of lien or judgment - Interest and income from contracts, agreements or obligations that arose prior to freeze	Payment of lien or judgment	Payment of lien or judgment	Professional fees or service charges
Grounds for exemptions to travel ban	Religious obligation, judicial process, case-by-case	Case-by-case basis		Religious obligation, humanitarian need, to further peace and stability	Religious obligation, humanitarian need, case-by-case basis		
Justification for exemptions[iii]	Personal hardship, legal obligations *vis a vis* other parties	Humanitarian, in interest of democratic government			Humanitarian, religious, in interest of regional stability	Humanit-arian, religious, interest of peace in region	Humanitarian, religious, in interest of resolution
Agent for requesting exemptions	MS wishing to authorize access to funds	MS through Permanent Mission		T: Permanent Mission or nearest UN office to listed individual/entity	MS wishing to authorize access to funds	Perm. Mission/ nearest UN office to individual/ entity	MS through Permanent Mission

[i] The Sudan Committee (UNSCR 1591) currently has guidelines under active review. UNSCR 1591 specifies that in addition to expenses described in the below note that payments of lien or judgment should be exempted from financial assets freezes. Travel exemptions specified under UNSCR 1591 include religious and/or humanitarian need, as well as travel in furtherance of regional peace and stability.

[ii] The Security Council Resolutions described in this table that include assets freezes (Al Qaida/Taliban, Liberia, DRC, and Cote d'Ivoire) all include exemptions for basic living expenses: "including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds, other financial assets and economic resources." These resolutions also allow for, on a case-by-case basis, additional exemptions for extraordinary expenses.

[iii] Travel and/or financial only, not including exemptions to arms embargo.

Table II, cont.	**Al-Qaida/ Taliban (1267)**	**Sierra Leone (1132)**	**Iraq (1518)**	**Liberia (1521)**	**DRC (1533)**	**Cote d'Ivoire (1572)**	**Lebanon/ Syria (1636)**
Days (max) to consider exemption[i]	2	2		T: 4	4	4	T: 5 F: 2
Information required for exemption	Name, bank info, purpose, number/amount of transfers, payment type, interests, dates, specific funds			T: Identifying information, purpose(s), dates, itinerary and details (e.g., flight #s)		Identifying info, purpose, dates, itinerary, details and statement of justification	T: Identifying information, purpose(s), dates, itinerary and details F: Name, bank info, purpose, number/ amount of transfers, payment type, interests, dates, specific funds
Notification of exemptions[ii]	Committee notifies MS	Committee notifies MS		T: Name of traveler posted on website until return	Committee notifies MS	Comm. notifies MS	Commission or government of Lebanon notifies MS
Notification of updates to list	Website, press release, MS informed, Interpol	Website, press releases	MS informed, website, press releases	T: Website, press releases, Note Verbale to MS	Website, press releases	Website, press releases, Note Verbale to MS	Website, press releases
Period to consider updates to list	- 4 weeks for MT to advise Committee - 5 day NOP		3 days for NOP	F: At least 2 days before quarterly review		At least 2 days before quarterly review	

B. Periodic Review

In the absence of regular review of committee designations, listing can become the functional equivalent of a "forfeiture" of assets or an individual's ability to travel. Open-ended sanctions, without some form of periodic review, raise considerable concerns. The 1267, Liberia, and Côte d'Ivoire Committees mandate periodic reviews of issues already pending before the committee, including requests for exemptions and delisting. The time periods vary widely, with the 1267 Committee reviewing pending issues monthly, while the Liberia Committee is only required to review the financial sanctions twice a year. Some have argued that mandating a periodic review of all of the individuals and entities on the list will increase the credibility of the lists and decrease unnecessary

[i] Although committee guidelines specify the number of days over which the Committee is to consider exemptions, in some cases, these suggested time limits have been substantially exceeded.

[ii] While not specified in the guideline for DRC and Côte d'Ivoire, in practice these committees notify Member States of exemptions.

efforts by states to enforce sanctions. Such practices of periodic review are commonly used by Interpol.

C. Transparency of Committees

The practices of sanctions committees, in particular regarding decisions on listing, delisting, and exemptions, are confidential. Accepting the need for confidentiality of individual cases, some have expressed concern that committees pay more attention to questions and requests from their current members than they do from nonmembers of the Security Council. In particular, access to information and transparency of committee procedures have been cited as common frustrations. Improvements in the responsiveness of committees regarding information requests would help alleviate such frustrations and encourage more consistent implementation by all Member States, a point taken up in Section Four.

III. Delisting Procedures

One of the most frequently cited criticisms of targeted sanctions concerns the perceived lack of an adequate process by which individuals or entities may petition for their removal from the list. Although the guidelines of several sanctions committees include procedures for removing names, these guidelines vary by committee, with differing standards as to (A) who has standing to petition for delisting, (B) requirements for information and criteria upon which to base delisting decisions, and (C) the timeframe for responding to such requests.

Table III summarizes current practices of UN sanctions committees relating to delisting procedures. Of the committees reviewed, two have delisted individuals—1267 and Sierra Leone — while four committees have guidelines or procedures in place that allow for delisting requests to be considered. In the case of Sierra Leone, the committee removed 10 individuals from the travel ban list in 2003 upon request of the government of Sierra Leone and the Special Representative of the Secretary General. The names were removed because the individuals had died. The 1267 Committee has delisted a total of 19 individuals and entities to date.

A. Who May Petition for Delisting

One of the most contentious issues regarding delisting concerns who has standing to petition sanctions committees. For example, only the target's country of residence or citizenship may request removal from the 1267 Consolidated List.

Partly resulting from concerns that individuals or entities might lack access to appeal their listing, and due to the unique situation in the country, the Côte d'Ivoire Committee Guidelines specifically allow the Permanent Mission of the targeted entity's nationality or residence, or a UN office, to submit a request for delisting. As part of the quarterly review of the list, the guidelines provide for considering requests (in writing) for removal. Since the Côte d'Ivoire Committee has only recently designated a list of individuals subject to sanctions, there have been no delisting requests.

Table III: Delisting[i]

	Al-Qaida/ Taliban (1267)	Sierra Leone (1132)	Iraq (1518)	Liberia (1521)	DRC (1533)	Côte d'Ivoire (1572)	Lebanon/ Syria (1636)
Number of targets listed and delisted	464 listed 19 delisted	30 listed 27 delisted	295 listed 0 delisted	T: 59 listed 0 delisted F: 58 listed 0 delisted	16 listed 0 delisted	3 listed 0 delisted	0 listed 0 delisted
Parties able to request delisting	Gov't of petitioner's residence/ citizenship		Gov't of petitioner's residence/ citizenship	F: Gov't of petitioner's residence/ citizenship T: Permanent Mission of petitioner's nationality/ residence - UN office - Indiv.[ii]		- Permanent Mission of petitioner's nationality/ residence - UN office - Indiv.[iii]	
Criteria for delisting	Unspecified, negotiated bilaterally	Unspecified, negotiated bilaterally	Unspecified negotiated bilaterally				Individual no longer suspected of involvement in assassination
Information required of listed party	Justification and relevant information		Justification and relevant information	F: Justification and relevant information		Justification and relevant information	
Timeframe for delisting request	5 day NOP		3 day NOP	T: At least 2 days before quarterly review F: 2 days NOP		At least 2 days before quarterly review	2 day NOP, 15 days to consider request if objection
In case no consensus is reached	Referred to the UNSC	Referred to Committee Chair	Referred to the UNSC				

[i] The Sudan Committee (established under UNSCR 1591) has neither listed nor delisted any individuals or entities; the committee currently is actively considering delisting guidelines.

[ii] Individuals may make delisting requests directly to the committee in exceptional circumstances only.

[iii] Unlike with the Liberia Sanctions Committee, the ability of individuals to directly petition the Côte d'Ivoire Committee for delisting is not specified in relevant resolutions or committee guidelines, and the inclusion of this information is the result of a personal communication.

Owing to unique circumstances on the ground, the Liberia Committee's procedures also allow for requests for delisting through the Permanent Missions of listed individuals' nationality or through the nearest UN office. Moreover, "in exceptional cases, the Committee will consider requests received directly from individuals." To consider an individual's case, the committee must first unanimously decide that the case is "exceptional." However, there are no guidelines spelling out what constitutes "exceptional," and the two individual delisting requests have been unsuccessful. The Liberia Committee represents the only instance in which individuals are theoretically permitted to petition a sanctions committee directly.

The bilateral (Designating State/Petitioning State) delisting procedure developed by the 1267 Committee has been the focus of most attention and criticism. This attention mostly stems from the fact that the number of individuals and entities listed on the 1267 List is by far the largest with 464, which has grown significantly since 11 September 2001. Over time, more than 50 Member States have expressed concern in Security Council Open Committee sessions about the need to strengthen procedural safeguards for individuals and entities affected by targeted sanctions. Since the Member States permitted to petition on behalf of a listed individual or entity are limited to states of residence or citizenship of the targeted party, problems may exist for targets on the consolidated list in states that may unjustly oppose or refuse to forward delisting petitions to the 1267 Committee. The 1267 Committee has thus far been unwilling to consider delisting petitions from individuals.

A total of 19 entities have been removed from the 1267 List, but it is not clear how many other parties have sought delisting, but due to lack of support from their Member State of residence or citizenship, these other parties have never been forwarded to the 1267 Committee. Many critics of the 1267 Committee delisting procedure have indicated that the biggest problem with delisting involves those requests that never make it to the committee. Critics of the process are concerned because this would constitute a denial of access of an individual or entity affected by a targeted sanction to appeal their listing.

B. Criteria for Delisting and Information Required

To varying degrees, the three committees with published guidelines concerning delisting requests — 1267, Liberia, and Cote d'Ivoire—all provide that petitioners submit a justification for delisting requests and offer relevant information. More specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available, with the exception of the 1636 Committee, by any committee. The current procedures not only lack specific guidance from the respective committees on justifications for delisting, but they are also complicated since the criteria and concerns of the state originally proposing the listing are generally unknown.

In cases where parties have been removed from the list, discussions generally are conducted on a bilateral basis between the Member State originally proposing the listing and the country of the designee's residence or citizenship, with the committee ratifying the request proposed by the two governments. Such bilateral negotiations are usually confidential, but the case of two Swedish nationals of Somali origin delisted in 2002 provides some insight into the criteria for delisting. According to US government officials, the two were delisted, not because of an error in the listing, but

because:

> [they] submitted information, evidence, sworn statements first that they had no knowledge that the al-Barakaat business that they were associated with were being used, either directly or indirectly, to finance terror. And second, they submitted evidence, documents and sworn certification that they had severed all ties with al-Barakaat, that they had disassociated themselves fully and completely with al-Barakaat.[90]

In another case, an individual was removed from the list after cooperating with authorities and testifying against his accomplices.

A particularly vexing problem for the 1267 Committee is how to handle the names of deceased persons. The 1267 Monitoring Team and Member States have raised this issue as important to the credibility of the list. Complicated questions as to rights of inheritors, as well as concerns about the potential misuse of assets are at issue, but the effort to develop a general approach to deceased individuals has not yet advanced very far.

C. Time Limits for Responding to Delisting Requests

A final criticism of the current delisting procedures is that even though some committees have time limits for consideration of delisting requests, since they are subject to no objection procedures, in practice, such requests can carry on indefinitely. States may either object without specifying a reason, or demand a technical hold that places the request on indefinite hold. In recognition of this fact, most states undertake bilateral negotiations before submitting such requests. To address this situation, some have suggested time limits for addressing pending requests, with automatic approval after a certain period of time, or requirements that holds be accompanied with justification for the objection.

SECTION FOUR

Recommendations and Options to Enhance Fair and Clear Procedures

Based on the description of current practices, challenges, and deficiencies of UN sanctions committees presented in Section Three, this section proposes recommendations to enhance fair and clear procedures, as well as options for a new institutional review mechanism. Recommendations are grouped under the categories of listing and procedural issues, and options are presented for review mechanisms to consider delisting requests. The recommendations made in this section are summarized in Appendix B.

Recommendations

As has been noted elsewhere in the text and as summarized in Chart I, incremental improvements have been made in listing and procedural issues over the past several years, especially by the 1267 Committee. Other committees have not revised procedures to the same degree, and there are additional measures that the 1267 Committee and other committees should consider, particularly with regard to notification, accessibility, periodic review, and the establishment of a review mechanism.

A. Listing

As is evident from the comparative information presented in Table I, most UN Security Council sanctions committees have established general norms concerning identifying information for listed individuals and entities. There has been significant improvement in the quality of identifying information since targeted sanctions were first introduced in the early 1990s. There are other areas where considerable variation remains among the different sanctions committees. In the pursuit of fair and clear procedures, we offer the following recommendations for consideration. Some are general principles, whereas others are recommendations for specific changes.

1. Criteria for listing should be detailed, but non-exhaustive, in Security Council resolutions.

Precise definition of the objectives of sanctions and criteria for listing promotes effective implementation, as well as serves to demonstrate to individuals what they need to do for sanctions to be lifted. Greater clarity also assists Member States in assessing which individuals and entities should be subject to sanctions. UNSCR 1617 usefully defines what it means to be "associated with" Al-Qaida, Usama bin Laden, or the Taliban, although some Member States still find the formulation "or otherwise supporting acts or activities," in operative paragraph 2 of the resolution, vague. Although more precise definition in resolutions is generally desirable, some flexibility needs to be retained to avoid constraining sanctions committees from being able to respond to important changes in the situation, making it difficult for them to add an appropriate listing in the future. We recommend that Security Council resolutions include detailed, but non-exhaustive criteria for listing those subject to sanctions.

2. Establish norms and general standards for statements of case.

It is important that consistent norms and general standards for the content of statements of case be established to ensure that targeted sanctions are applied to individuals and entities in a manner that is nonarbitrary and impartial. UNSCR 1617 requires that Member States describe "the basis of the proposal" for a designation in the statement of case. Best practices concerning statements of case should be identified by the relevant sanctions committee, possibly with a checklist or standardized form listing information to be included for each listing, as suggested in the Fourth Report of the 1267 Monitoring Team. Likewise, copies of formal arrest warrants should be included as accompanying documents in the statement of case, when appropriate. The difficulty of defining clear and specific standards for designations provides a strong argument for why options for a review mechanism (see below under delisting) should be considered. We recommend that statements of case include a specific narrative regarding the listed individual or entity, accompanied by detailed information describing the individual or entity's participation in activities that are proscribed by the Security Council. To promote more widespread use of detailed statements of case, assistance should be provided to Member States in preparing listing proposals, including the development of a guide to the preparation of statements of case.

3. Extend time for review of listing proposals from two or three to five to ten working days for all sanctions committees.

It is important that the members of sanctions committees have sufficient time to review proposals for listing, to ensure that targeted sanctions are applied in a nonarbitrary and impartial manner. The 1267 Committee has already extended the time for review of listing proposals from two to five days. Given differences in time zones from New York to many capitals, and the need for review by both law enforcement and intelligence agencies, two or three days is often not sufficient for a serious review and the effective operation of the no-objection procedure. This is especially true for Member States generally lacking in administrative capacity. Member States often request and are granted an extension of time to review listing proposals. The European Union provides its Member States at least ten *working* days to examine proposals for listing (and discusses them). We therefore propose that the time for review of listing proposals be extended from two or three days to five to ten working days for all sanctions committees.

4. To the extent possible, targets should be (a) notified by a UN body of their listing, the measures being imposed and information about procedures for exemptions and delisting, and (b) provided with a redacted statement of case and the basis for listing.

a) *Notification* is essential to the establishment of fair and clear procedures. At present, UN sanctions committees rely on Member States to notify an individual or entity of their listing. While this is sufficient in many cases, the centrality of notification for procedural fairness suggests that some redundancy could usefully be built into the system by providing supplemental notification by a UN body (recognizing that actions of the UN do not have direct legal effect). It is important that notification be timed to coincide with national implementation of measures (to prevent possible evasion of sanctions). UNSCR 1617 requests relevant Member States to inform individuals and

entities to the extent possible, and in writing, of the measures being imposed, the committee's guidelines, and procedures for listing and delisting. It does not call for provision of information about the reasons for their listing and it does not define the meaning of "relevant" Member States.

Notification of an individual or entity of their inclusion on sanctions lists can only take place to the extent practicable and is not a prerequisite for listing. In cases of renowned terrorists or individuals evading international law enforcement, the location of targets is not known, making notification impossible. To accomplish systematically the objective of supplemental notification, as well as permit targeted individuals to petition for delisting and exemptions, we recommend the designation of a focal point within the Secretariat. (See recommendation B-1 below).

b) *Redacted Statement of Case.* While statements of case are not distributed, UNSCR 1617 authorized the release of statements of case under certain circumstances, which could strengthen enforcement and provide more information on the reasons for particular listings. A redacted statement of case, which does not disclose confidential information but provides the target with information regarding the basis of the measures imposed, is important for fairness, transparency, and effective implementation of sanctions. We therefore propose that such statements should be prepared, and to the extent possible, designees should have access to the redacted statement and information stating the basis for the listing.

B. Procedural issues

Like the norms concerning identifying information for listed individuals and entities, sanctions committees have developed general norms about handling exemptions. The grounds for exemptions and information required for exemptions are increasingly standardized across the different committees, as there appears to have been much learning and borrowing of best practices from other committees in recent years. This is again indicative of improvements in committee practices since targeted sanctions were first introduced in the early 1990s. Exemptions for basic needs also help ensure that proportionality standards are met and that their application does not inappropriately interfere with fundamental rights. There are other areas where problems remain, however, and in the pursuit of fair and clear procedures, we offer the following recommendations for consideration.

1. Designate an administrative focal point within the Secretariat to handle all delisting and exemption requests, as well as to notify targets of listing.

It is impossible to know precisely how many requests are *not* forwarded to sanctions committees, but the fact that some Member States have been required by regional courts to forward delisting requests to relevant committees suggests that it could be an important concern. In conflict situations where existing state structures have virtually collapsed, some sanctions committees have permitted individuals to submit delisting requests to UN offices, or directly to the committee in exceptional circumstances.[91] A designated person or entity should be certain that his, her, or its case will be presented for review by the designating body or some other appropriate body (see below under delisting for various options for review mechanisms).

In an effort to address the issues of delisting and exemptions, the 1267 Monitoring Team proposed that Member States be required to forward any delisting or exemption requests to the 1267 Committee, along with their position of support, opposition, or neutrality about the proposal. The formation of an administrative mechanism—a focal point within the Secretariat—could accomplish the same goal systematically receiving and processing requests for delisting and exemptions, while at the same time ensuring that targets are notified of their listing (to the extent possible).

We recommend that an administrative focal point be designated within the UN Secretariat as the single entry/exit point for delisting and exemption requests (see Figure I in the Appendix A for a visual presentation how the focal point would operate.) The focal point would:

- Receive delisting requests from individuals or their government of citizenship/residence (or in certain cases, the nearest UN office, or in exceptional cases, the sanctions committee);
- Forward these requests to the Designating State and the state of citizenship or residence for their information and for their comments (approval, objection, neutral position), which the states would provide to the focal point;
- Forward the request, along with any comments, to the relevant sanctions committee for action. In the event of repeated requests without any new justification (spurious requests), and only in this case, the focal point could decide not to forward requests.

As the contact point for listed individuals, the focal point would also:

- Provide supplemental notification of their listing (in addition to whatever notification relevant Member States make);
- Provide a redacted statement of case;
- Provide procedural information, including committee guidelines, and procedures to request exemptions or delisting;
- Inform petitioners of the decision of the sanctions committee.

The focal point would not have decision-making or advisory responsibilities, but be entirely administrative to ensure efficient and consistent interaction with listed parties.

Such an approach provides notification and opportunity for targeted individuals and entities to appeal their listing (especially important in cases in which the individual's government does not have an interest in pursuing delisting), without giving individuals direct access to the sanctions committee or Security Council. It would provide consistent treatment and common standards in delisting procedures, improve transparency of delisting and exemptions procedures, and ensure that all requests are processed and received by the sanctions committees. It would also relieve sanctions committees of routine administrative tasks while preserving their decision-making authority. A Sanctions Administrative Office with small staff could perform these tasks.

2. Establish a biennial review of listings.

One criticism of targeted sanctions applied as a preventive measure, such as the sanctions applied against Al-Qaida and the Taliban, is that because they are open-ended, an extended freeze of assets without periodic review can become a *de facto* confiscation of assets (even though an asset freeze is technically not a confiscation of property). Listings have no time limit and apparently can continue indefinitely. The 1267 Monitoring Team has proposed a periodic review of listing requests similar to the five-year review used by Interpol. In its Fourth Report, the 1267 Monitoring Team proposes automatic renewal of the listing unless the 1267 Committee determines by consensus that the threat has subsided and the individual or entity should be removed from the list. While innovative, it is unlikely that this procedure would result in timely consideration of new information on a listing as it becomes available.

A review every five years is too long a time period given the rapid changes and developments in most sanctions situations. Our recommendation is therefore that reviews should be conducted every two years on a rolling basis from the date of initial listing.

Automatic renewal of listings after a specified period unless a new consensus is formed does not necessarily ensure a thorough periodic review of listings. Some have proposed that listings be automatically terminated after two years, unless the designating or another Member State can justify continuation of listing. While this would appropriately place more of the burden on the listing Member State to renew its statement of case and indicate why removal from the list should not take place, we believe the decision to continue listing should still be made by consensus of the sanctions committee, without automatic termination of the listing. Given improvements in standards over time, however, renewal of listings should meet the higher standards and norms used for statements of case prevailing at the time of renewal. Obviously, there are resource implications of such reviews, and it is important that the committee not become bogged down in its important work.

3. Enhance the effectiveness of sanctions committees through time limits for responding to listing, delisting, and exemption requests, as well as clear standards and criteria for delisting.

Currently, there are no time limits within sanctions committees to deal with indefinite holds on listing, delisting, or exemption requests. Although there is a need to have additional time for Member States to address issues, indefinite holds can weaken the effectiveness of sanctions (if appropriate individuals are not listed) and affect the credibility of sanctions if exemptions and delisting requests are not considered in a timely manner. Some states have suggested the need for automatic granting of requests after a certain time without response. We recommend a more modest way to ensure timely consideration of issues—impose a standard time limit of 30 days (with the opportunity to extend for an additional 30 days) for replies to pending requests, and a periodic (quarterly) notification to committee members of all outstanding requests.

In addition, standardized criteria for submitting delisting requests may help eliminate delays. Although specific criteria for delisting will vary according to the purpose of the sanctions, we recommend adoption of general criteria for delisting that includes wrongful or inaccurate listing

(similar name, but different domicile or birth date), changed circumstances (renunciation of terrorism or cooperation with states), or deceased (depending on whether remaining assets are likely to be deployed to support the proscribed activity).

4. Increase the transparency of committee practices through improved websites, frequent press statements, and a broader dissemination of committee procedures.

Increased transparency would go a long way toward addressing perceptions of unfairness in sanctions committee procedures. As this report frequently suggests, important innovations in procedure have already taken place in many sanctions committees, and there is a good deal of institutional learning underway within the UN. The 1267 Monitoring Team has proposed that redacted statements of case be made available to states and organizations (such as Interpol), upon committee approval, as a way of strengthening targeted sanctions. Moreover, additional attention to these issues within the Security Council—the possibility of *Arria Formula* meetings with third parties (e.g., Member States not on the Security Council but countries of the birth or residence of listed individuals requesting delisting)—could serve as a public forum to consider related issues, enhancing the perception of transparency and openness. We recommend that sanctions committees improve websites, conduct more frequent press conferences, and provide more information to non-Security Council members and the public.

C. Options for a Review Mechanism

In addition to reforming current sanctions committee procedures as noted above, the other significant issue concerns whether there is some form of review mechanism to which individuals and entities may appeal decisions regarding their inclusion on the list of targets.

The debate among legal scholars as to whether the Security Council is bound by international human rights standards, and therefore obliged to ensure that fair and clear procedures exist for individuals targeted by sanctions, is an important question, but not addressed directly here.[92] Rather, this white paper assumes that the United Nations, through its organs, strives to observe fair and clear procedures as much as possible (hence the directive in the World Summit Outcome document). Situations in which the United Nations finds the implementation of its resolutions called into question are disadvantageous at best, and damaging to the credibility of UN procedures at worst. To date, national and regional courts have accorded Security Council decisions taken under Chapter VII of the UN Charter primacy in international law, but challenges have emerged as discussed in Section Two. The Security Council could discourage such action by improving existing procedures and establishing a review mechanism to ensure fairness and clarity. Such preemptive action not only avoids costly litigation, but also enhances the perception of the Security Council as being responsive and transparent.

Elements of Effective Remedy

Adopting the recommendations proposed above will not be sufficient to address all of the concerns of procedural fairness identified in Sections Two and Three. In particular, the right to an effective remedy has special relevance and requires additional changes beyond those recommended above.

Broadly construed, the right to an effective remedy traditionally entails three elements:

1) an independent and impartial authority;[93]
2) the power to grant appropriate relief;[94] and
3) procedural guarantees such as accessibility for individuals or entities affected.[95]

The key question is to determine what institutional mechanism and combination of elements meet the test of an effective remedy. Since it is, in practice, a political question for the Security Council to determine what measures are appropriate to ensure fair and clear procedures for individuals and entities targeted by sanctions, we present options for consideration without recommendation.

Of the five options the Security Council might consider as institutional mechanisms to address delisting, several have been discussed to varying degrees, particularly concerning court challenges to individuals' designations under UNSCR 1267. However, to the extent that delisting is an ongoing issue for most sanctions committees, the following options need not be limited to the 1267 Committee, but rather should be considered as mechanisms for sanctions committees in general.

We provide a brief description and arguments both for and against each option. To facilitate a systematic comparison of the five options with each other, and with current practice within the 1267 Committee, there is a table at the end of this section (Chart II).

Of particular note, we have presented the five options as heuristic models, or ideal types, portraying how different review mechanisms might be constituted. Within each option is a range of choices as to the specific elements of such a mechanism—composition, authority, powers, transparency, etc. It is necessary to recognize the possibilities for variation within each option, and to view the options as models of the type of institutional form a review mechanism could take. Moreover, although various Member States have advanced proposals for review mechanisms, the options should not be confused with other proposals by a similar name, or attributed to any particular Member States.

1. Develop a review mechanism under the authority of the Security Council for consideration of delisting requests.

Following are three institutional variations of a review mechanism under the authority of the Security Council. The options assume that delisting requests are received by an administrative body (focal point).

a. Monitoring Team

One institutional mechanism would entail the 1267 Monitoring Team (MT) being charged with the responsibility to review requests for delisting and exemptions. The panel would be appointed by the Secretary-General, and composed of subject-area experts, as is currently done, with the possible addition of legal expertise. Following analysis of all relevant information, the MT would advise the committee with recommendations. Access to the MT would be ensured though an administrative focal point mechanism (if not, individuals would need to be able to submit requests directly to the MT), but no opportunity for individuals to appear formally before the MT would exist. Deliberations of the MT would be confidential (no public disclosure about recommendations), as would the recommendation to the sanctions committee. The MT would have access to full, nonredacted statements of case.

The advantage of such an approach is that it does not create a new costly or bureaucratic body, but rather integrates the function into an existing structure. To the extent that the existing MT is experienced in preparing analytical assessments and handling confidential information, it would be relatively easy to accomplish administratively. Because the Secretary-General appoints members of the MT independently of the Security Council, and accessibility by individuals is assured, two of the effective remedy elements are addressed.

The MT recommendations are advisory only, and not binding on the sanctions committee. Moreover, while independently appointed, since its mandate is determined by the Security Council, the MT may not be sufficiently independent in its decision making authority. A potential conflict of interest could exist for the MT in monitoring sanctions and supporting the committee, as well as serving in an independent advisory role. Responsibility for making recommendations about individual cases may risk the loss of MT's credibility and trust in performing other important functions. The confidential nature of the proceedings also has disadvantages in terms of transparency. There may be a gap in expertise between the MT members (who are often sectoral experts) and the demands of the review function.

b. Ombudsman

An alternative institutional mechanism would entail the designation of an ombudsman, to whom individuals could appeal. The ombudsman would be independently appointed and make independent recommendations about delisting requests. The Secretary-General would choose an eminent person to serve as ombudsman, based on recommendations from the UN High Commissioner for Human Rights and the Under Secretary for Political Affairs. In this manner, the ombudsman would be an individual able to ensure a broad-based review of delisting requests, taking into account all factors (concerns of designating state, the maintenance of international peace and security, and assurance of fair and clear procedures) in making a decision.

The ombudsman, after reviewing a redacted version of the statement of case, would submit a recommendation to the sanctions committee, which may endorse or disregard the recommendation. Thus, the ombudsman's decision would not be binding on the sanctions committee. Procedurally, the ombudsman would be accessible by listed individuals, but there would not be a formal hearing, nor

would the ombudsman have access to nonredacted statements of case. A public report on its work would be prepared on an annual basis.

The advantage of the ombudsman is that it provides an independent mechanism for review of listing requests, both in its independent appointment, as well as its authority to render its own recommendations. It also affords individuals direct access to lodge a complaint, and therefore is accessible.

The decisions of the ombudsman are not binding on the sanctions committee. The ombudsman also does not afford opportunities for a hearing, nor does it have full access to information as it reviews nonredacted statements of case. Implementation of the ombudsman proposal would entail costs associated with maintaining a small administrative unit. In addition, while one purpose of creating the ombudsman is to discourage legal challenges to the sanctions regime, if a recommendation is rejected by the committee, it could encourage further litigation.

c. Panel of Experts

Drawing upon a model used both within and outside the UN system of semi-judicial or administrative bodies, a panel of experts would be empowered to consider specific requests for delisting. Useful precedents include monitoring groups established by various UN human rights treaties (such as the Human Rights Committee (ICCPR)) and the Committee against Torture.[96] The Secretary-General would appoint a roster of independent experts with appropriate experience (in criminal, administrative, or international law) to form either standing or *ad hoc* panels to hear individual delisting requests. The panel would have competence to render a decision, and so notify the sanctions committee. The committee could endorse or reject the panel's decision, thus making its advice nonbinding on the sanctions committee. Should the sanctions committee reject the panel's decision, the issue would be forwarded to the Security Council, according a higher-level review, but still retaining authority for the final decision by the Security Council on the delisting request.

Listed individuals may appeal their inclusion on the list directly to the Panel of Experts, making the mechanism accessible to individuals. In the conduct of its review, the panel would have access to nonredacted statements of case and other information through appropriate procedures to ensure protection of confidential information. Decisions of the panel, though not binding, would be made public to the appropriate degree.

Advantages of expert panels include the well-established precedent in other fora of such entities providing independent and impartial review, both in the appointment of the experts and in the panel's ability to render decisions independently. Although the decisions of such panels are not legally binding, they have been broadly accepted. In addition, panels of experts are accessible to individuals, who may be heard, depending on the circumstances. Access to nonredacted statements of case affords a full review of available information and public decisions enhance transparency.

As in the option of the ombudsman, a panel's decision is not binding on the sanctions committee. Creation of the Panel of Experts would entail greater costs than the ombudsman in retaining

appropriate experts and operations of the panel. In addition, while one purpose of such a mechanism is to discourage legal challenges to the sanctions regime, if the committee rejects a recommendation, this would likely encourage further litigation.

2. Create an independent arbitral panel to consider delisting proposals.

Based on the model of arbitral panels such as those under the auspices of the Permanent Court of Arbitration in The Hague or the International Centre for Settlement of Investment Disputes, a list of arbitrators and experts with appropriate experience (criminal or administrative law, security, human rights) would be composed by the Secretary-General and called upon to form *ad hoc* three-member panels to hear individual delisting appeals. Sanctions committees would delegate the authority to make decisions, and thus, decisions of the panel would be binding upon the sanctions committee and be made public. The panel would have access to full (nonredacted) statements of case, and individuals requesting delisting would be granted the right to a hearing.

The arbitral panel could be constructed in a manner similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) whereby the Security Council delegates determinations of guilt or innocence to the tribunal. The mechanism is analogous to the way current delistings are handled by the 1267 Committee (as a bilateral issue between the listing state and the state of residence or nationality) with which sanctions committees ordinarily comply. Thus, the outcome of the bilateral negotiations is binding, since the sanctions committees ratify the panel's decisions on delisting requests.

Advantages of an arbitral panel approach are that independence is guaranteed through the panel's appointment, authority to make decisions, and especially its ability to grant relief. In addition, an arbitral panel provides accessibly to individuals, and access to nonredacted statements of case affords a full review of available information. Public decisions would enhance transparency.

Such an option could raise concerns of infringing upon the authority of the Security Council, and certain costs would be required to maintain such a mechanism.

3. Provide judicial review of Security Council decisions.

As a last resort where delisting had been denied, individuals would have access to an independent and impartial court, whose decisions would be binding on the Security Council and its sanctions committees. The Security Council would establish a judicial institution (such as the United Nations Administrative Tribunal[97]) with competence to review decisions of sanctions committees concerning delisting requests.

Judicial review of delisting requests meets the elements of independence, competence to grant relief, accessibility, and transparency. It would balance the legislative and executive functions increasingly being taken on by the Security Council. It would also eliminate the risk that regional or national

courts find the UN sanctions system in violation of international human rights standards. Judicial review provides the greatest degree of transparency.

Opposition to judicial review of Security Council decisions taken under Chapter VII of the Charter is well known. Judicial review raises concerns of infringing upon the authority of the Security Council. The costs of defending sanctions committees' decisions in court could be sizable, especially when compared to the small caseload.

Chart II: Summary Comparison of Review Mechanism Options to Current Practice[i]

	Current Practice	Monitoring Team	Ombudsman	Panel	Arbitral Panel	Judicial Review
Composition Independently Appointed	No	Yes	Yes	Yes	Yes	Yes
Authority Independent to make decisions	Yes	No	Yes	Yes	Yes	Yes
Power Competence to grant relief	No	No	No	No	Yes	Yes
Procedural Guarantees Accessible by individual	No	Yes	Yes	Yes	Yes	Yes
Other Investigatory power (access nonredacted information)	No[ii]	Yes	No	Yes	Yes	Yes
Hearing[iii]	No	No	No	Yes	Yes	Yes
Transparency (decisions made public)	No	No	Yes/No[iv]	Yes	Yes	Yes

[i] Assumes some form of administrative unit to receive individual delisting requests is adopted.

[ii] If the initiating state shares information with the state requesting delisting, or if the state requesting delisting is a member of the Security Council, access to information may be provided but is not assured.

[iii] To the extent possible--clearly targeted individuals sought by international law enforcement would not be able to travel or appear for a hearing, but could be represented.

[iv] The annual report of the ombudsman allows for some transparency, but on an aggregated basis and not concerning specific requests.

SECTION FIVE

Conclusion

The UN General Assembly has called upon the Security Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions."[98] Precisely what constitutes "fair and clear procedures" is contested, however, and its determination will necessarily rely on both legal and political arguments. It is a judgment that will ultimately be made by the Security Council.

The establishment of fair and clear procedures requires both procedural fairness and the presence of an effective remedy. Procedural fairness implies procedural due process, which entails the right to adequate notification and the opportunity to be heard.[99] Thus, to be considered "fair and clear," UN targeted sanctions procedures should be accessible to the individual or entity affected, and as discussed in Section Two, provide for an effective remedy in the case of wrongful application. While aspects of these conditions are present in the operations of UN sanctions committees to varying degrees, the current system for handling listing, exemptions, and delisting, as described in Section Three, does not meet these standards, and is in need of reform.

The adoption of several of the recommendation made in Section Four would go a long way toward addressing some of the concerns about unfairness and the lack of transparency in sanctions committee operations. The current bilateral (state-to-state) delisting procedure that relies on diplomatic protection of individuals as the sole remedy for initiating delisting requests is problematic. For this reason, the establishment of an administrative focal point within the Secretariat, not only to receive all delisting requests, but also to ensure that targets are notified of their listing (to the extent possible), would enhance the procedural fairness of the process. Strengthened norms and standards for the contents of statements of case and extending the time for review of listing proposals would improve the fairness and impartiality of the designations process. A biennial review of listings would address concerns about open-ended asset freezes becoming *de facto* confiscations. Placing time limits for responding to listing, delisting, and exemption requests, would deal with indefinite holds on outstanding requests. Redacted statements of case indicating the basis for listing would contribute to public awareness of the need for preventive sanctions and provide a strengthened basis for more effective implementation.

While adoption of these recommendations would deal with general concerns about the lack of fairness, they would not address the requirement for an effective remedy in the case of wrongful application of a targeted sanction. Effective remedy requires some form of review mechanism to consider delisting requests. It should be accessible, independent, and, in a legal sense, able to grant appropriate relief. The formation of an arbitral tribunal or establishment of judicial review would clearly meet all three of these criteria, including the authority to grant relief. A review mechanism under the authority of the Security Council – Monitoring Team, Ombudsman, or Panel of Experts proposals – vary in the degree of independence and would not meet the criterion of ability to grant

relief (unless that authority were delegated by the Security Council). The extent to which the review mechanism's decisions were made public, however, could constitute a form of relief.

As noted above, these issues are both legal and political. Given the extraordinary nature of the Security Council's role in promoting international peace and security, some margin of appreciation or flexibility in interpretation as to what constitutes effective remedy is appropriate. To date, courts addressing these issues have acknowledged the special position of the Security Council, reaffirming the primacy of its decisions taken under Chapter VII of the UN Charter and its special role in maintaining international peace and security. Thus, procedures ensuring effective remedy may be different in such circumstances involving the security of a state, or where international peace and security may be at stake, and the criteria for effective remedy may vary.[100]

Although the legal challenges in a number of countries represent a potentially significant threat to the efficacy of targeted sanctions, they also present an opportunity. Seizing that opportunity requires reform of the current system, both by improving sanctions committees' procedures, as well as by establishing some form of review mechanism. Ultimately, ensuring fair and clear procedures in the UN sanctions process will strengthen the effectiveness and credibility of the targeted sanctions instrument.

More can and will be done on these questions, and several important issues have not been fully addressed in this paper.[101] We are hopeful nonetheless that our effort may help to clarify the issues and advance common objectives of fair and clear procedures in the application of targeted sanctions.

ENDNOTES

[1] General Assembly Resolution 60/1, *2005 World Summit Outcome*, para. 109, at http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf

[2] Targeted sanctions include financial, travel, aviation, arms and commodities restrictions with the objective of applying coercive pressure on transgressing parties, leaders and the network of elites and entities that support them, in order to change behavior or prevent actions contrary to international peace and security, as in the case of sanctions against the Taliban and Al-Qaida.

[3] See *Targeted Financial Sanctions: A Manual for Design and Implementation*, available at www.smartsanctions.ch and www.watsoninstitute.org/TFS/TFS.pdf; *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* available at http://www.bicc.de/events/unsanc/2000/booklet.php; and *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options*, available at http://www.smartsanctions.se.

[4] The issue of improving the effective implementation of sanctions is of crucial significance to many Member States and deserves further attention.

[5] *New York Times*, April 13, 2002.

[6] Report of the High-Level Panel on Threats, Challenges, and Change, A More Secure World, Our Shared Responsibility, UN Document 1/59/656, para. 153, 2 December 2004 at: http://www.un.org/secureworld/report.pdf

[7] *2005 World Summit Outcome*, para. 106-110.

[8] *Implementation of Decisions from the 2005 World Summit Outcome for Action by the Secretary-General*, UN Document A/60/430, para. 20, 25 October 2005.

[9] See the Third and Fourth Reports of the 1267 Monitoring Team at http://www.un.org/Docs/sc/committees/1267/1267mg.htm.

[10] Fourth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, page 14.

[11] This would imply that individuals and entities affected should minimally be guaranteed the "right to good administration" defined in Article 41 of the EU Charter to include a right to have affairs handled impartially, a right to be heard, a right of access to files (while respecting legitimate confidentiality), and the obligation of the administration to give reasons for its decisions.

[12] See Preamble, Articles 1 and 55 of the UN Charter.

[13] UN Doc. GA/RES/217 A (III), 10 December 1948.

[14] UN Doc. A/CONF/157/23, 12 July 1993, para. 8. Also see the *World Summit Outcome*, para. 121.

[15] Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR).

[16] Article 1 of Protocol 1 to the ECHR.

[17] Article 17 of the ICCPR protects individuals' privacy, family, home or correspondence, honor and reputation, whereas Article 8 of the ECHR protects private and family life.

[18] Article 14 of the ICCPR and Article 6 of the ECHR.

[19] Article 13 of the ECHR.

[20] Article 6 of the ICCPR and Article 2 of the ECHR.

[21] This is not a hypothetical example. In the case of the Sierra Leone sanctions regime, the Sanctions Committee was requested to lift the travel ban on humanitarian grounds for one of the listed persons, namely Foday Sankoh, so that Sankoh who was in custody of the Special Court of Sierra Leone could receive medical treatment in Accra, Ghana. Sankoh died while the committee was deliberating for months over the request, and also asking for written assurances that Sankoh be kept in custody and that the request be accompanied by more specific information, such as details about the purpose of

the travel and dates of departure and return. See Annual Report of the Sierra Leone Sanctions Committee, *UN Doc.* S/2004/166, 27 February 2004, paras. 13-14.

[22] Exemption clauses were used in the context of the Iraq-Kuwait crisis in relation to sanctions on Iraq (e.g. Resolution 687 (1991): exemptions to the sanctions regime could be made in cases of "essential civilian need") and also with regard to sanctions on Yugoslavia (Serbia and Montenegro) (e.g. Resolution 757 (1992): exemptions to the sanctions regimes could be made in cases of "essential humanitarian need"). Exemptions clauses were already included in the 1960s in the sanctions regime imposed on South Rhodesia with respect to food and educational materials, see *e.g.* S/RES/253, 29 May 1968, 3(d) and 4.

[23] Article 18 of the ICCPR and Article 9 of the ECHR.

[24] This right to seek asylum is recorded in Article 14 of the Universal Declaration on Human Rights, but not included in the ICCPR or the ECHR. Protection of those who seek asylum is also granted by the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

[25] Notably, Pakistan has asked the Monitoring Group for assistance in providing evidence and information supporting the freezing of the assets of the individual concerned to strengthen its case before the court, *UN Doc.* S/AC.37/2003/(1455)/35, 24 April 2003, under 6.

[26] See for information on each of these cases, the annexes to the third and fourth report of the 1526 Analytical Support and Sanctions Monitoring Team, *UN Doc.* S/2005/572, 9 September 2005, Annex II. Also see the individual reports of States to the 1267 Sanctions Committee pursuant to para. 6 of Resolution 1455 (2003).

[27] In contrast, the text of Article 8 of the UDHR does not require that the rights or obligations are civil in nature.

[28] CCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984. Instead of proposing a definition, the Committee urges States' parties to "explain in greater detail how the concepts of 'criminal charge' and 'rights and obligations in a suit at law' are interpreted in relation to their respective legal systems"

[29] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, Kehl am Rhein: Engel, 2005, p. 314-315 and 318.

[30] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary*, Kehl am Rhein: Engel, 2005, p. 318.

[31] As argued before the Human Rights Committee in the case of *V.R.M.B. v. Canada*, Communication No. 236/1987, 26 July 1988, para. 5.2.

[32] HRC, *Ivon Landry v. Canada*, Communication No. 112/1981, 8 April 1986, para. 9.2. As confirmed in HRC, *Casanovas v. France*, Communication No. 441/1990, 10 August 1994, para. 5.2.

[33] HRC, *Ivon Landry v. Canada*, Communication No. 112/1981, 8 April 1986.

[34] HRC, *Muñoz Hermoza v. Peru*, Communication No. 203/1986, 17 November 1988, paras. 11.3 and 12; *Casanovas v. France*, Communication No. 441/1990, 10 August 1994, paras. 4.3 and 5.2.

[35] HRC, *Paul Perterer v. Austria*, Communication No. 1015/2001, 20 August 2004, para. 9.2.

[36] HRC, *Williams Adu v. Canada*, Communication No. 654/1995, 12 August 1997, para. 6.3.

[37] HRC, *I.P. v. Finland*, Communication No. 450/1991, 26 July 1993, para. 6.2.

[38] ECtHR, *Engel and others v. Netherlands*, Judgment, 8 June 1976, para. 81.

[39] C. Ovey and R.C.A. White, *Jacobs and White European Convention on Human Rights*, Oxford University Press, 3rd ed., 2002, p. 141 (hereinafter Ovey and White (2002)).

[40] See *e.g.* ECtHR, *König v. Germany*, Judgment, 28 June 1978, paras. 88-89.

[41] ECtHR, *Sporrong and Lönnroth v. Sweden*, Judgment, 23 September 1982, paras. 80-83.

[42] ECtHR, *Feldbrugge v. The Netherlands*, Judgment 29 May 1986, paras. 26-40 (on the sickness insurance scheme); ECtHR, *Deumeland v. Germany*, Judgment, 29 May 1986, paras. 60-74 (on the industrial-accident insurance scheme), and ECtHR, *Schuler-Zgraggen v. Switzerland*, Judgment, 24 June 1993, paras. 44-46 (on an invalidity pension).

[43] See *e.g.* ECtHR, *Vidacar s.a. and Opergrup s.l. v. Spain*, Decision on admissibility, 20 April 1999 (Appl. No. 41601/98,41775/98).

[43] Security Council Resolution 1572 (2004), 15 November 2004 para. 9. On 7 February 2006, the first three persons we
listed. The justifications given for the listings included the facts that the listed individuals had repeated public statemen
advocating violence against United Nations installations and personnel, and against foreigners; directed and participated
acts of violence by street militias, including beatings, rapes, and extrajudicial killings; that forces under the command
one listed person had engaged in recruitment of child soldiers, abductions, imposition of forced labor, sexual abuse
women, arbitrary arrests, and extrajudicial killings; all contrary to human rights conventions and to internation
humanitarian law.

[44] *UN Doc.* S/2005/572, 9 September 2005, para. 40.

[45] The 1526 Analytical Support and Sanctions Monitoring Team in its third report: the term could still be better define
UN Doc. S/2005/572, 9 September 2005, para. 41. See also para. 39: "The List is not a criminal list. Rather it contains t
names of those who have engaged in or supported Al-Qaida or Taliban terrorism in some tangible way, regardless
whether any authority has formally charged them with a criminal offence." And para. 32 of the fourth report of the 15
Analytical Support and Sanctions Monitoring Team, "The List is intended as a preventive, rather than a punitive measure

[47] ECtHR, *Case of Tinnelly & Sons Ltd and others and Mcelduff and Others v. the United Kingdom*, Judgment, 10 Ju
1998. Also see J.P. Loof, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen: Wolf Legal Publishe
2005, p. 320-324, and M.K. Bulterman, Oh, baby, baby, it's a wild world, in 30 *NJCM Bulletin*, 1069-1084, 1079.

[48] For the Article to apply it is not necessary to prove that another right of the Convention has been violated. It is sufficie
that a claim regarding infringement of another right under the ECHR is made. See ECtHR, *Klass v. Germany*, Judgme
6 September 1978, paras. 62-64.

[49] ECtHR, *Klass v. Germany*, Judgment, 6 September 1978, para. 67.

[50] ECtHR, *Klass v. Germany*, Judgment, 6 September 1978, para. 69, as also cited by Ovey and White (2002: 390).

[51] ECtHR, *Leander v. Sweden*, Judgment 26 March 1987, para. 84, as also cited by Ovey and White (2002: 390). Also s
ECtHR, *Klass v. Germany*, Judgment 6 September 1978, para. 72.

[52] Under the ECHR, decisions on asylum are not covered by Article 6.

[53] Recommendation of the Committee of Ministers to member States on the right of rejected asylum seekers to an effecti
remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, Rec (9
13, adopted during the 641st meeting, 18 September 1998.

[54] See, *e.g.*, the Report of the Panel of Experts on Liberia, *UN Doc.* S/2002/470, paras. 158-159 as referred to by I
Cameron, Targeted Sanctions and Legal Safeguards, Report for the Swedish Government, 2002, p. 7, fn. 17. The
complaints concerned the Liberia Sanctions Committee established pursuant to Resolution 1343 (2001). See also anot
Report of the Panel of Experts on Liberia, *UN Doc.* S/2004/396, 1 June 2004, para. 156, reporting that several individu
had complained about their listing and had submitted that did not have any ties or contact with Charles Taylor any long
And see the Report of the Panel of Experts on Liberia, *UN Doc.* S/2004/955, 23 November 2004, para. 171, for anot
claim of innocence. These latter complaints concerned the Liberia Sanctions Committee established pursuant to Resolut
1521 (2003).

[55] *UN Doc.* S/2005/745, of 25 November 2005, para. 157.

[56] *E.g.* Guidelines of the 1267 Committee as adopted on 7 November 2002, amended on 10 April 2003 and revised
21 December 2005, under 8. The Liberia Sanctions Committee can receive in exceptional circumstances applicatio
directly from individuals, see Procedures for updating and maintaining the list of persons subject to travel restrictio
pursuant to Resolution 1521 (2003), para. 3. See also Table III on page 34 which compares the practices of sanctio
committees.

[57] *UN Docs.* S/RES/757 (1992), S/RES/760 (1992), S/RES/787 (1992), S/RES/820 (1993).

[58] ECJ, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and othe*
C-84/95, 30 July 1996.

[59] ECtHR, *Case of Bosphorus Hava Yollari Turzim ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Gra
Chamber, 30 June 2005.

[60] ECtHR, *SEGI and others v. 15 States of the European Union*, Application number 6422/02, 23 May 2002.

[61] ECFI, *SEGI and others v. Council*, Order, T-338/02, 7 June 2004.

[62] ECFI, *SEGI and others v. Council*, Order, T-338/02, 7 June 2004, para. 38.

[63] ECFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005. Although the two judgments are not identical, the main legal findings on the issues relevant for this paper are comparable and based on the same sources and the same legal reasoning. Therefore, the two judgments are dealt with in one section.

[64] Initially, two other individuals joined the challenges in the case of Yusuf, namely Adirisak Aden and Abdi Abdulaziz Ali. However, these two individuals were struck off the list at the request of Sweden on 26 August 2002. See more elaborately: Per Cramér, Recent Swedish experiences with targeted UN sanctions: erosion of trust in the Security Council, in Erika de Wet and André Nollkaemper (eds.), *Review of the Security Council by Member States*, Antwerp: Intersentia, 2003, p. 85-106.

[65] ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, ICJ Reports 1992.

[66] ICTY, *The Prosecutor v. Tadić*, Appeal Decision, 2 October 1995, paras. 14-22; ICTR, *The Prosecutor v. Kanyabashi*, Decision, 8 June 1997.

[67] Article 297 of the revised EC Treaty reads: "'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take … in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

[68] Article 307 reads: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

[69] *Kadi case*, paras. 178-208; *Yusuf case*, paras. 228-259.

[70] Article 103 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[71] *Kadi case*, paras. 209-232; *Yusuf case*, paras. 260-283.

[72] See ICJ Judgment, 3 February 2006, ICJ Reports 2006, at www.icj-cij.org.

[73] J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, 2002, pp. 246-247.

[74] *Kadi case*, paras. 234-252; *Yusuf case*, paras. 285-303.

[75] Note that the right to property is included in the 1948 Universal Declaration of Human Rights and the First Protocol to the 1950 European Convention on Human Rights, but not in the 1966 International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights.

[76] *Kadi case*, paras. 261-291; *Yusuf case*, paras. 309-346.

[77] It was proposed by the Rapporteur, John Dugard in his First Report on Diplomatic Protection, International Law Commission 52nd session, A/CN.4/506, paras. 74, 87, 88, but not included in the Draft Articles as submitted to the Sixth Committee, International Law Commission, Diplomatic Protection, *Titles and texts of the draft articles adopted by the Drafting Committee on first reading* UN Doc A/CN.4/L.647 adopted on 24 May 2004, article 2. Cf. Report of the International Law Commission, 56th Session, GAOR 59th Session (Supplement no. 10 A/59/10), at 17-22.

[78] ECJ, *Yassin Abdullah Kadi v. Council*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-402/05 P, 24 November 2005; ECJ, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-415/05 P, 1 December 2005.

[79] The term "associated with" is further explained in Resolution 1617 (2005).

[80] *UN Doc.* S/2005/572, 9 September 2005, paras. 55-56, especially fn. 25.

[81] Although some would argue that the *SEGI* case concerned internal EU law implementing Resolution 1373 and is not directly applicable to the 1267 sanctions, in fact the reasoning of the court can be applied to the 1267 sanctions. These sanctions can also be regarded as law *in abstracto* since they require implementation by Member States, as the Common

Position requires implementation by the European Community and the Member States. Moreover, also in the case of 1267 sanctions, the listing is not the act that infringes upon the human rights concerned; the acts that may do so are the actual sanctions that are imposed because of the listing. Even though the imposition of these sanctions is the direct result of the listing, they are two different acts, and the ECtHR has clearly held that listing in itself does not violate human rights, leaving the question open whether this might be the case for the sanctions that result this listing, given that no evidence had been adduced of these consequences in the case at hand.

[82] *UN Doc.* S/2005/572, 9 September 2005, para. 54.

[83] Key to Abbreviations: DOB = Date of Birth; DS = Designating State; F = Financial—Freezing funds, financial assets and economic resources of individuals and entities, including funds derived or generated from property owned or controlled directly or indirectly by individuals and entities associated on list, and preventing access to funds or financial resources to individuals or entities on list; IO = International Organizations; NOP = No objections procedures; POB = Place of Birth; PS = Petitioning State; T = Travel—Preventing the entry into or transit of listed individuals through states other than that of the sanctions committee; Blank box = Information not found in relevant resolutions or guidelines.

[84] See S/RES/1617 (2005), paragraph 2, which elaborates that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Usama bin Laden, or the Taliban include: participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name or, on behalf of, or in support of; supplying, selling or transferring arms and related materials to; recruiting for; or otherwise supporting acts or activities of; Al-Qaida, Usama bin Laden, or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

[85] The EU approach to identifying information is found in paragraph 22 of the Sanctions Guidelines (European Council document 15114/05, which states that "The EU should strive in all cases to ensure that the identifying information provided at the time of the inclusion of a person on a list should be sufficiently precise to allow for an unambiguous identification of the targeted person. After designation of a person or entity, a constant review of identifiers should take place in order to specify and extend them, involving all those who can contribute to this effort, in particular the EU Heads of Mission in the third country concerned, Member States' competent authorities and agencies and financial institutions." See http://register.consilium.eu.int/pdf/en/05/st15/st15114-en05.pdf.

[86] EU Member States have at least "working days" instead of calendar days to examine proposals for designations under the EU Common Position 2001/931/CFSP.

[87] The DRC Committee has no formal guidelines, but it has designated individuals based on temporary use of the Cote d'Ivoire Committee Guidelines.

[88] UNSC Resolution 1452 (2002) para. 1(a).

[89] See 2nd report of Monitoring Group, December 2003 pg 22, regarding the request for an exemption to pay taxes/attorney fees at http://www.un.org/Docs/sc/committees/1267/1267mg.htm.

[90] Jimmy Gurule, Under Secretary of Treasury for Enforcement, "Update on Tracking the Financial Assets of Terrorists: One Year Later," Foreign Press Center Briefing, Washington, DC, September 9, 2002. Accessed online, 21 March 2006: http://fpc.state.gov/13337.htm.

[91] This has been practiced only by the Liberia Committee, and only for six months historically.

[92] The United Nations Office of Legal Affairs has been tasked to develop proposals and guidelines to address fair and clear procedures through para.109 of A/Res/60/1 and para. 20 of the Secretary General's report A/60/430.

[93] For purposes of this discussion, independence involves two aspects: appointment and decision-making. While independent appointment (for example, a panel appointed by the SG independent of the Security Council) is important, the primary meaning of independence relates to the decision-making process. According to Black's Law Dictionary, independence means "not subject to control or influence of another person."

[94] Under a strict interpretation of the right to an effective remedy, the authority's competence to grant appropriate relief is generally construed as the competence to decide, rather than advise or recommend —i.e., have its decisions be binding. Other factors, however, might also be considered.

[95] Accessibility pertains to the requirement that the individual should have (direct) access to the remedy, i.e. he should be able to lodge a complaint and have access (standing) to the procedure. Other procedural components include: access to

information (whether statement of case information is complete (nonredacted) or partial (redacted); the opportunity for a hearing; and transparent decisions.

[96] Another interesting model is the Kosovo Advisory Panel as outlined in the opinion of the Venice Commission of the Council of Europe on the possible establishment of a human rights mechanism in Kosovo. See *European Commission for Democracy Through Law Opinion 280/2004*, 11 October 2004, paras 113-133 at http://venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp

[97] The United Nations Administrative Tribunal was established by the General Assembly (resolution 351(IV) on 9 December 1949 as a means to deal with disputes between the UN and members of its staff.

[98] United Nations General Assembly Resolution 60/1, *2005 World Summit Outcome*, paras 109.

[99] Drawing on general standards of administrative law, procedural fairness would also require that targeted sanctions should also be impartial in their application (not arbitrary) and proportionate in the sense that they do not inappropriately interfere with fundamental rights. With regard to impartial application, recent improvements in practices relating to norms for listing appear to approach minimal standards for nonarbitrary, impartial application. They could be strengthened with the establishment of norms and consistent standards for the contents of statements of case (recommendations in Section Four (A2)) and an extended time for review of listing proposals (A3). Given their standardization by Security Council sanctions committees, existing exemptions policies for providing basic needs appear to meet minimal proportionality standards and expectations with regard to fundamental rights. The fact that asset freezes do not constitute a seizure of property, but a suspension of access to a portion of property, ensures that the right to property is not deprived.

[100] For example, accessibility of individuals to the review mechanism need not necessarily be outright direct, as long as accessibility is ensured. Likewise, whereas the right to an effective remedy suggests that a review mechanism have binding authority or the power to decide a case (rather than advise or recommend), it is possible that ultimate decision-making responsibility remains in the sanctions committee or Security Council. A review body that has advisory power, rather than the competence to make binding decisions, arguably might be considered an effective remedy, particularly if its decisions are made public.

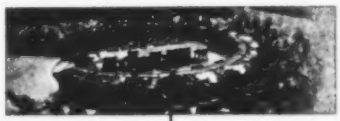
[101] While the term "individuals and entities" is used throughout this paper, entities present unique issues, the implications of which has not been addressed in this paper. Given the relatively recent experience with entities requesting delisting, further analysis is needed. In addition, the paper does not address the issue of compensation for individuals wrongly listed.

APPENDIX A

Flow Charts of Administrative Focal Point and Review Mechanisms

Figure I:

Administrative Focal Point



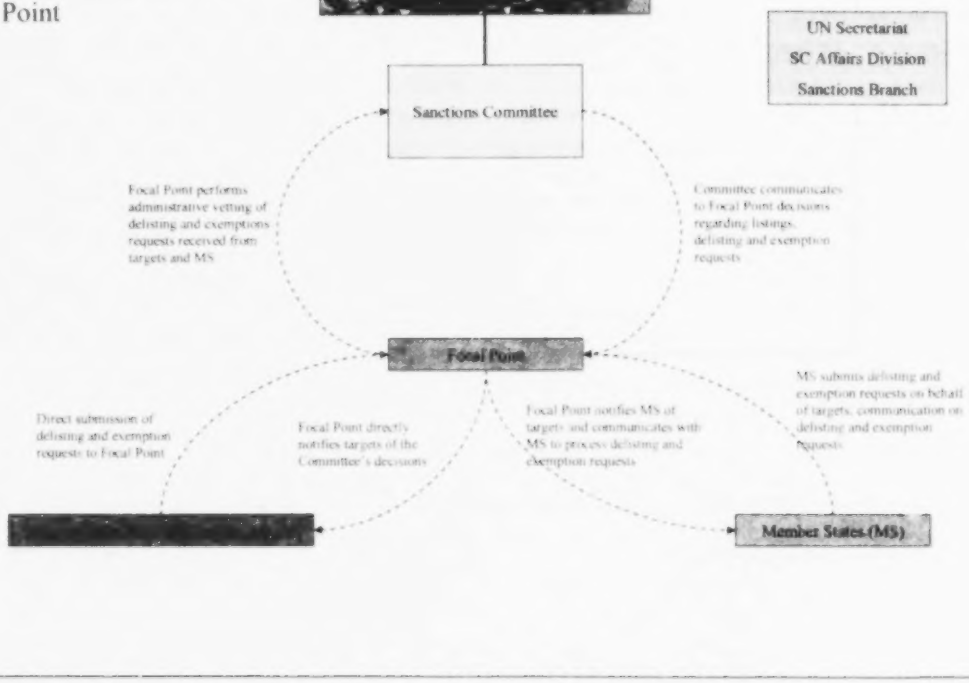
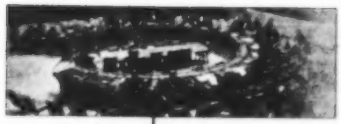

UN Secretariat
SC Affairs Division
Sanctions Branch
Sanctions Committee
Focal Point performs administrative vetting of delisting and exemptions requests received from targets and MS
Committee communicates to Focal Point decisions regarding listings, delisting and exemption requests
Focal Point
Direct submission of delisting and exemption requests to Focal Point
Focal Point directly notifies targets of the Committee's decisions
Focal Point notifies MS of targets and communicates with MS to process delisting and exemption requests
MS submits delisting and exemption requests on behalf of targets, communication on delisting and exemption requests
Member States (MS)

Figure II:

Review Mechanisms



UN Secretariat
SC Affairs Division
Sanctions Branch

Sanctions Committee

6. Review Mechanism issues recommendation/ decision

Review Mechanisms:
- Monitoring Team (MT)
- Ombudsman
- Panel of Experts
- Arbitral Panel
- Judicial Review

2. Focal Point performs administrative vetting of delisting requests received from targets and MS

3. Committee communicates decision regarding delisting to Focal Point

7. Committee action

- MT, Ombudsman, or Panel of Experts recommendations are advisory

- Arbitral Panel and judicial decisions are binding

5. Target appeals the Committee's decision

Focal Point

1. Target or MS submits delisting request to Focal Point

4. Focal Point directly notifies target or MS of the Committee's decision

APPENDIX B

Recommendations and Options to Enhance Fair and Clear Procedures

To address shortcomings of existing UN Security Council sanctions committee procedures, we recommend the following proposals:

Listing

1. *Criteria for listing should be detailed, but non-exhaustive, in Security Council resolutions.*

2. *Establish norms and general standards for statements of case.*

3. *Extend time for review of listing proposals from two or three to five to ten working days for all sanctions committees.*

4. *To the extent possible, targets should be (a) notified by a UN body of their listing, the measures being imposed, and information about procedures for exemptions and delisting, and (b) provided with a redacted statement of case and the basis for listing.*

Procedural issues

1. *Designate an administrative focal point within the Secretariat to handle all delisting and exemption requests, as well as to notify targets of listing.*

2. *Establish a biennial review of listings.*

3. *Enhance the effectiveness of sanctions committees through time limits for responding to listing, delisting, and exemption requests, as well as by promulgating clear standards and criteria for delisting.*

4. *Increase the transparency of committee practices through improved websites, more frequent press statements, and a broader dissemination of committee procedures.*

Options for a Review Mechanism

Beyond procedural improvements, there is a need for some form of review mechanism to which individuals and entities may appeal decisions regarding their listing. Options to be considered include:

1. *A review mechanism under the authority of the Security Council for consideration of delisting proposals.*

    a) Monitoring Team–expand the existing group's mandate.
    b) Ombudsman–appoint an eminent person to serve as interface with UN.
    c) Panel of Experts–create panel to hear requests.

2. *An independent arbitral panel to consider delisting proposals.*

3. *Judicial review of delisting decisions.*